FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 28 1960
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee,

ON APPEAL FROM THE SUPEME COURT OF WISCONSIN

BRIEF FOR THE APPELLANT

TRAYTON L. LATHROP,
Appellant

Room 305
122 West Washington Avenue
Madison 3, Wisconsin

LEON E. ISAKSEN
Of Counsel

Room 305
122 West Washington Avenue
Madison 3, Wisconsin

November 25, 1960

THE GILMAN PRESS, MADISON, WIS.

INDEX

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	7
QUESTION INVOLVED	9
STATEMENT OF THE CASE	10
Parties	10
Requirement of Membership in a Bar Association	10
Nature and Activities of the State Bar of Wisconsin	14
Payment of Dues Under Protest	22
Determinations of the Courts Below	23
SUMMARY OF ARGUMENT	24
I. The Rules for Integration of the Bar Unjustifiably Infringe Upon the Right of Free Association	24
II. The Compulsory Bar Unduly Invades the First Amendment Freedom of Free Speech	28

PAGE

ARGUMENT 30

I. THE RULES FOR INTEGRATION OF THE BAR UNJUSTIFIABLY INFRINGE UPON THE RIGHT OF FREE ASSOCIATION GUARANTEED BY THE FOURTEENTH AMENDMENT 30

A. The Holding of the Wisconsin Supreme Court That the Fourteenth Amendment Does Not Guarantee Freedom Not to Join Associations is Erroneous 30

1. Since the Beginning of This Nation the Right to Freely Move In and Out of Associations Has Been Deemed To Be a Basic Right Which May Not Be Impaired By Government 30

2. The Right of Free Association Is Protected From State Action By the Fourteenth Amendment 39

3. The *Hanson Case* Did Not Pass On the Right of Free Association 41

4. The Right of Free Association Extends Into All Fields of Human Interest 42

5. Conclusion 42

B. There Is No Justification for Invasion of the Freedom of Association In This Case 43

1. Only the Most Unusual and Compelling Circumstances Justify Invasion of the Right of Free Association 43

2. Attorneys Are Entitled to Constitutional Protection of Freedom of Association as Well as Other Persons 45

PAGE

a. The court below justified its action, in part, on the ground that the practice of law is a privilege 45

b. Integration of bar associations is widely justified on the ground the practice of law is only a privilege 45

c. The practice of law should not be described as a privilege under a constitutional government such as that in the United States .. 46

d. The right of an attorney to freely associate is not dependent upon concepts of right or privilege to practice 49

3. Constitutional Rights of Freedom of Association May Not Be Invaded By Describing the Integrated Association As a State Agency Or An Arm of the State 50

4. The Fact That the Voluntary Association's Membership Had Become Static and the Fact That the Court Had No Current List of Attorneys Are Not Overriding Reasons 51

5. A Belief That the Public Is Entitled To Know How Attorneys Feel On Legislative Proposals Is Not a Compelling Reason Justifying the Invasion 52

a. The court below stated that the public is entitled to know how a majority of the attorneys feel on a great variety of public questions 52

PAGE

b. The court below felt no need to learn what a majority of the attorneys felt about a compulsory bar association 54

c. The intended effect of integration is to increase the influence of the association upon the legislature and the people in carrying out the aims and principles of the association 55

d. Integrated bar associations are political parties 58

e. The acts compelling membership in bar associations constitute a precedent for other types of "integrated" associations 60

C. Conclusion 64

II. THE COMPULSORY BAR ASSOCIATION VIOLATES THE FIRST AMENDMENT FREEDOM OF FREE SPEECH 65

A. The Wisconsin Supreme Court Justified the Compulsory Bar Association on the Ground That the Securing and the Publicizing of the Opinions of Attorneys Is In the Public Interest 65

B. The Wisconsin Supreme Court Erroneously Assumed That the Compulsory Bar Association Does Not In Fact Invade Freedom of Speech 66

C. Neither a Governmental Authority Nor the Public is Entitled to Know the Opinions of Attorneys On Any Legislation 69

D. Forced Affirmation of Belief or Opinion is Rarely Sustained 71

PAGE

E. There Is No Countervailing State Interest To Justify the Invasion of the First Amendment Freedoms 75

F. Conclusion As To Invasion of Free Speech 77

III. CONCLUSION 77

TABLE OF CASES

Adam v. Saenger (1938) 303 U. S. 59 19

Adamson v. California (1947) 332 U. S. 46 6

Adler v. Board of Education (1952) 342 U. S. 485 74

Allgeyer v. Louisiana (1897) 165 U. S. 578 39

Am. Comm. Assoc. v. Douds (1950) 339 U. S. 382 ..... 68, 69, 71, 72, 74

Ayres v. Hadaway (1942) 303 Mich. 589, 6 N. W. 2d 905 ..... 46, 48

Barenblatt v. United States (1959) 360 U. S. 109 41

Bates v. City of Little Rock (1960) 361 U. S. 516 ..... 40, 44

Beilan v. Board of Education of Philadelphia (1958) 357 U. S. 399 74

Bridges v. California (1941) 314 U. S. 252 35

Buchanan v. Warley (1917) 245 U. S. 60 ..... 44, 76

PAGE

Burstyn v. Wilson (1952) 343 U. S. 495 44

Butchers' Union etc. Co. v. Crescent City etc. Co. (1883) 111 U. S. 746 39

Cammarano v. United States (1959) 358 U. S. 498 42

Cammer v. United States (1956) 350 U. S. 399 48

Cantwell v. Connecticut (1940) 310 U. S. 296 .....44, 76

Chandler v. Fretag (1954) 348 U. S. 3 47

DeJonge v. Oregon (1937) 299 U. S. 353 36

Dent v. West Virginia (1889) 129 U. S. 114 48

Fiske v. Kansas (1926) 274 U. S. 380 .....39, 42

Fleming v. Nestor (1960) 363 U. S. 603 41

Florida State Bar Association, Petition of 52, 53

Frost Trucking Co. v. Railroad Comm. (1926) 271 U. S. 583 49

Galusha, In re (1921) 184 Cal. 697, 195 Pac. 406 48

Garland, Ex parte (1867) 4 Wall. 333 49

Garner v. Board of Public Works (1951) 341 U. S. 716 74

Green v. McElroy (1959) 360 U. S. 474 49

PAGE

Hamilton v. University of California (1934) 293 U. S. 245 6

Integrated Bar (1947) 321 Mass. 747, 74 N. E. 2d 140 55

Integrating the Bar, In re (1953) 222 Ark. 35, 259 S. W. 2d 144 55

Integrating and Unifying the State Bar, Petition for Rule of Court Activating (1955) 199 Tenn. 78, 282 S. W. 2d 782 55

Integration of Bar Case (1943) 244 Wis. 8, 11 N. W. 2d 604, 12 N. W. 2d 699 ..... 4, 10, 11, 12

Integration of Bar, In re (1946) 249 Wis. 523, 25 N. W. 2d 500 12

Integration of Bar, In re (1956) 273 Wis. 281, 77 N. W. 2d 602 ..... 13, 44, 52

Integration of the Bar, In re (1958) 5 Wis. 2d 618, 93 N. W. 2d 601 ..... 7, 14

Integration of Bar, Petition for (1943) 216 Minn. 195, 12 N. W. 2d 515 46

Integration of Bar, Petition for (1948) 226 Minn. 578, 34 N. W. 2d 157 55

Jamison v. Texas (1943) 318 U. S. 413 6

Joint Anti-Fascist Refugee Comm. v. McGrath (1951) 341 U. S. 123 38

PAGE

Kelso v. Cook (1916) 184 Ind. 173, 110 N. E. 987 59

King Mfg. Co. v. Augusta (1928) 277 U. S. 100 6

Kingsley Corp. v. Regents of N. Y. (1959) 360 U. S. 684 35

Konigsberg v. State Bar of California (1957) 353 U. S. 252 ..... 40, 74

Lathrop v. Donohue (1960) 10 Wis. 2d 230, 102 N. W. 2d 404 1

Lerner v. Casey (1958) 357 U. S. 468 74

Milligan, Ex parte (1866) 4 Wall. 2 35

NAACP v. Alabama (1959) 357 U. S. 449 ..... 39, 41, 42, 47

Pappas v. Stacey (1955) 151 Me. 36, 117 Atl. 2d 497 30

Patterson v. Colorado (1907) 205 U. S. 454 39

Poulos v. New Hampshire (1953) 345 U. S. 395 6

Powell v. Alabama (1932) 287 U. S. 45 47

Public Utilities Commission v. Pollak (1951) 343 U. S. 451 ..... 68, 72

Railway Employees Dept. A. F. L. v. Hanson (1956) 351 U. S. 225 ..... 25, 41

Reynolds v. United States (1879) 98 U. S. 145 70

PAGE

Royall v. Virginia (1886) 116 U. S. 572 49

Schafer v. Whipple (1898) 25 Colo. 469, 55 Pac. 180 59

Schenck v. U. S. (1919) 249 U. S. 47 72

Schneider v. State (1939) 308 U. S. 147 .....43, 76

Schware v. Board of Bar Examiners (1957) 353 U. S. 232 .....40, 49

Scott, In re (1930) 53 Nev. 24, 292 P. 291 46

Slaughter House Cases (1873) 16 Wall. 36, 21 L. ed. 395 .....32, 39

Speiser v. Randall (1959) 357 U. S. 513 .....44, 65, 70, 73, 76

State v. Harris (1940) 216 N. C. 746, 6 S. E. 2d 854 62

State v. Lange Canning Co. (1916) 164 Wis. 228, 157 N. W. 777, 160 N. W. 57 5

State ex rel. Preiss v. Seibel (1922) 295 Mo. 607, 246 S. W. 288 60

Staub v. Baxley (1958) 355 U. S. 313 39

Stevens v. Griffith (1884) 111 U. S. 48 5

Re Summers (1945) 325 U. S. 561 73

Sweezy v. New Hampshire (1957) 354 U. S. 234 .....7, 40, 49, 51, 68, 73

PAGE

Terminiello v. Chicago (1949) 337 U. S. 1 44

Thomas v. Collins (1945) 323 U. S. 516 .....42, 43, 69, 70, 71

United States v. Hall (C. C. S. D. Ala. 1871) Fed. Case No. 15,282 39

United States v. Rumely (1953) 345 U. S. 41 73

Unification of Bar of This Court, In re (1947) 119 Mont. 494, 175 P. 2d 773 55

Unification of Montana Bar Association, In re (1939) 107 Mont. 559, 87 P. 2d 172 55

Uphaus v. Wyman (Nov. 14, 1960 #336) 29 L. W. 4027 41

Uphaus v. Wyman (1959) 360 U. S. 72 41

Waples v. Marrast (1916) 108 Tex. 5, 184 S. W. 180 60

Watkins v. United States (1957) 354 U. S. 178 .....40, 68, 73

West Virginia Board of Education v. Barnette (1943) 319 U. S. 624 .....69, 72, 76

Wieman v. Updegraff (1952) 344 U. S. 183 .....40, 43, 74

Wis. Truck Owners Ass'n v. Public Service Comm. (1932) 207 Wis. 664, 242 N. W. 668 19

Yale, Ex parte (1864) 24 Cal. 241 48

CONSTITUTIONAL AND STATUTORY PROVISIONS

PAGE

Alabama, Code of 1940, Title 22 Sec. 1 61

California, Deering's Codes, Business and Profession Code Sections 6002, 6003, 6125, 6143 4

North Carolina Gen. Stats. 1958, Sec. 90-22 61

130-4 61

130-5 61

Oklahoma, R. S. 1951 Title 59 Sec. 221 et seq. 61

South Dakota Code 1960 sec. 27.0903 61

sec. 27.1402 61

State Bar of Wisconsin Rules and By-Laws 7, 14, 15, 16

Rule 1 4

Rule 1, Section 1 .....8, 51

Rule 2, Section 4 8

By-Laws Art. I, Section 3 8

United Nations Universal Declaration of Human Rights, Art. 20 .....24, 31

U. S. Code, Title 28 sec. 1257 (2) 3, 4, 5, 7

sec. 2103 7

PAGE

U. S. Const., First Amendment 28, 29, 35, 40, 44, 70, 71, 75, 76

Fifth Amendment 36, 47

Fourteenth Amendment .....
2, 3, 8, 9, 25, 30, 36, 39, 42, 43, 47, 64, 65, 78

Virginia Declaration of Rights (1776) 31, 33

Washington Rev. Code sec. 18.72.050 61

Wis. Const. Article I, sec. 22 31

Article VII, sec. 1 4

Article VII, sec. 20 47

Wis. Laws 1927 c. 314 18

Wis. Stats. 1959, sec. 13.70 19

256.28 (2a) 18

256.31 ..... 11, 14

TEXTS

Annals of Congress, Vol. 1, p. 759 (1834) 34

Commons, John R., Institutional Economics (1934) 62

Dicey, A. V., Introduction to the Study of the Law of the Constitution (6th Ed. 1902, London) 36

Federalist, The, edited by Paul L. Ford (1898) 37

PAGE

Gilb, Corinne L., Self-Regulating Professions and the Public Welfare, a case study of the California Bar (Unpublished Thesis, Radcliffe College, May 1956) .. 62

Glaser, William A., The Organization of the Integrated Bar (Aug. 1960) 57, 58

Hurst, James Willard, Law and the Conditions of Freedom in the Nineteenth Century United States .. 38, 61

Jay, William, The Life of John Jay (1833) 33

Madison, James, Letters and Other Writings of James Madison (1865) 36

Madison, James, Letters and Other Writings of James Madison (1884) 36, 38, 57

Pound, Roscoe, The Lawyer from Antiquity to Modern Times (1953) 32, 33, 63

Rutland, Robert Allen, The Birth of the Bill of Rights, 1776-1791 (1955) 31, 33, 34

Story's Commentaries on the Constitution of the U. S. (5th Ed) (1891) Vol. 2 Chapt. XLVII by T. M. Cooley 43

Tocqueville, Alexis, De, Democracy in America, 5th Ed. 1862, Vol. 1, Chapt. 12, Translated by Henry Reeve, Rev. by Francis Bowen 38

PERIODICALS AND PAMPHLETS

PAGE

Barkdull, H. L., "Methods of Strengthening Bar Associations," 35 Jour. Am. Jud. Soc. (June 1951) 50, 56, 58

Giles, Clarence F., "An Analysis of the Integrated Bar," 17 Albany Law Review, pp. 231, 235, 255 (1953) ..50, 55

Grant, J. A. C., "The Gild Returns to America," Vol. 4, The Journal of Politics, 303 et seq. 31, 32, 63

Guthrie, William D., "The Proposed Compulsory Incorporation of the Bar," 4 New York Law Review, 179-223 at page 231 (1926) 64

Guthrie, William D., "America's Debt to France—The Most Unalterable Gratitude" (New York City 1916) p. 9 33

Harley, Herbert, "Bar Integration is a National Movement," Vol. 8, Law Society Journal, pp. 80-88 (May 1938) 46

Harley, Herbert, Vol. 8, Journal Am. Jud. Soc. (Oct., 1924) 46, 56, 63

La France, Alfred E., Wisconsin Bar Bulletin, Vol. 28, No. 5, p. 6 (Oct., 1955) 13

"Michigan State Bar Success," 25 Journal Am. Jud. Soc. (April, 1942) p. 170 58

Sims, Henry Upsom, Proceedings of the 25th Annual Meeting of the Kentucky State Bar Assn. (1926) p. 86 63

PAGE

Webb, F. W. C., "Whole Bar Organizations—A Necessity," 29 Journal Am. Jur. Soc. 38, 43 (August, 1945).. 53

Wicker, William, 21 Tenn. Law Review 708 (1951) 50

Winters, Glenn R., Vol. 39, Journal Am. Jud. Soc. (Feb., 1956) p. 142 56

Wisconsin Bar Bulletin, Vol. 30, No. 3, p. 57 (June, 1957) 22

Wisconsin Bar Bulletin, Vol. 21, No. 2, p. 21 (April, 1956) 13

Your State Bar in Action (Feb., 1959) (Published by State Bar of Wisconsin) 57

In The

Supreme Court of the United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee,

ON APPEAL FROM THE SUPEME COURT OF WISCONSIN

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported as *Lathrop v. Donohue* (1960) 10 Wis. 2d 230, 102 N. W. 2d 404; is printed on pages 1a to 21a of the Appendix to the Jurisdictional Statement, and is printed on pages 66-81 of the printed record. The opinion of the Circuit Court for Fond du Lac County, Wisconsin, which was affirmed by the judgment here appealed from is not published but is printed on pages 22a to 39a of the Jurisdictional Statement and on pages 49 to 63 of the printed record.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This action was commenced by the appellant in the Circuit Court for Dane County, Wisconsin, and was removed at the request of the appellee to the Circuit Court for Fond du Lac County, Wisconsin.

The action was brought to recover the sum of $15.00 which was paid under protest by the appellant to the appellee, under coercion of certain rules adopted by the Supreme Court of the State of Wisconsin which compel membership in and support of an association of attorneys known as the State Bar of Wisconsin by all persons engaged in the practice of law in that state. The appellant is an attorney at law residing and practicing in the City of Madison, Wisconsin (R. 1).* The appellee is the treasurer of said association and resides in the City of Fond du Lac, Wisconsin (R. 1).

It was asserted in the Circuit Court by the appellant that said rules, insofar as they coerce the appellant to support said association, violate the Fourteenth Amendment of the United States Constitution (R. 7).

Upon a demurrer to the complaint, the Circuit Court rendered an opinion stating that the Wisconsin Supreme Court had exclusive jurisdiction of the subject matter of the action (R. 60); that there was a defect of parties defendant (R. 61); and that said rules do not violate the Fourteenth Amendment. (R. 61-62) Judgment was entered dismissing the complaint "upon its merits." (R. 64) On appeal to the Supreme Court of the State of Wisconsin, that

---

*The reference is to the printed record.

court treated the action as if it were commenced in that court (R. 68); held that there was no defect of parties (R. 68); and held that said rules do not violate the Fourteenth Amendment. (R. 77) The Wisconsin Supreme Court entered judgment on April 5, 1960 affirming the judgment of the Circuit Court. (R. 65-66).

The Notice of Appeal was filed in the Wisconsin Supreme Court on May 5, 1960 (R. 82), and the Jurisdictional Statement was filed in this court on June 30, 1960. On October 10, 1960, this court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. (R. 85)

The jurisdiction of this court is invoked under section 1257 (2), title 28, U. S. C., which provides for appeals from the highest court of a state:

> ". . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In this case, there is drawn in question the validity of certain rules promulgated by the Wisconsin Supreme Court on the ground that they are repugnant to the Constitution of the United States and the decision appealed from is in favor of its validity.

Thus, section 1257(2), Title 28, is applicable unless it can be said that said rules do not constitute a statute.

It is respectfully submitted that they do constitute a statute.

The rule making power of a state may be exercised in various ways. It may be exercised by the representatives of the people in an organic convention. The people may vest the rule making power in an elective body called a senate or an assembly or in a combination of bodies. The people may vest such rule making power in local units of government such as cities or villages, as has been done by "home rule" constitutional provisions. The people may vest both rule making power and the power to judge controversies in the same body as has been done in the case of some of the state senates, and as has been done in the case of some state courts.

When the Congress of the United States used the word "statute" in the section 1257 (2), it referred to rules of law adopted by the people of a state through their representatives.

In the case at hand, rules similar to those involved here have been enacted by bodies called senates, assemblies and houses of representatives in other states.[1] However, in Wisconsin the court asserted that the people have delegated this rule making function to it. See State Bar Rule 1 (R. 7) and *Integration of Bar Case* (1943) 244 Wis. 8, 11 N. W. 2d 604, 12 N. W. 2d 699. The rule making power is thus divided between the Senate and Assembly on the one hand and the Court on the other. By the same token, in Wisconsin the power to decide controversies is divided between the Court on the one hand and the Senate on the other. "The court for the trial of impeachments shall be composed of the senate." (Art. VII, Sec. 1, Wis. Const.)

---

[1] See for example Deering's California Codes, Business and Professions Code, sections 6002, 6003, 6125 and 6143. See also Giles, Clarence F., **An Analysis of the Integrated Bar**, 17 Albany Law Review p. 232.

The appellee's motion to dismiss the appeal asserted that section 1257 (2) referred only to the exercise of legislative authority. This may be true. But to legislate is to make rules of conduct and sanctions for the enforcement of them.

In *State v. Lange Canning Co.* (1916) 164 Wis. 228, 157 N. W. 777, 160 N. W. 57, the court held that the "legislative power" is the power to make laws and that law is defined as

> "... the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members." (164 Wis. p. 235.)

The Circuit Court in the case now before this court held that

> "A rule promulgated by the Supreme Court of Wisconsin is as effective as a law passed by the Legislature, *and in effect is a law of the State.* . . ." (R. 59, emphasis added)

The statement of the Circuit Court is sound. The Wisconsin Supreme Court did not disagree with that statement. The rules adopted by the Wisconsin Supreme Court are not merely a judgment as appellee asserted on page 10 of his motion to dismiss.

Indeed, the Wisconsin Supreme Court, in this case, held that the rules integrating the bar and continuing the same were "... an exercise of the police power. ..." (R. 74)

The pronouncement of the court in *Stevens v. Griffith* (1884) 111 U. S. 48, 50, is applicable here:

". . . Any enactment, to which a State gives the force of law, whether it has gone through the usual stages of legislative proceedings *or been adopted in other modes of expressing the will of the State, is a statute of the State* within the meaning of the Acts of Congress touching our appellate jurisdiction. . . ." (Emphasis added)

To the same effect is *King Mfg. Co. v. Augusta* (1928) 277 U. S. 100, 103-104, where the court stated:

"It of course rests with each state to determine in what form and by what agencies its legislative power may be exerted. . . . [W]hether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the state. . . ."

In *Jamison v. Texas* (1943) 318 U. S. 413, 414, the court was asked to reconsider the *King* decision and refused to do so. In accord are *Poulos v. New Hampshire* (1953) 345 U. S. 395, 402 and *Adamson v. California* (1947) 332 U. S. 46, 48.

In *Hamilton v. University of California* (1934) 293 U. S. 245, the court, apparently unanimous on this point, held that a rule of the Board of Regents of a state university was a statute, for appeal purposes. The court stated:

". . . [B]y the California constitution, the regents are . . . fully empowered in respect of the organization and government of the university which, as it has been held, is a constitutional department or function of the state government. . . . The assailed order prescribes a rule of conduct and applies to all students belonging to the defined class. . . . The meaning of 'statute of any state' *is not limited to acts of state legislatures. It is used to*

include every act legislative in character to which the state gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law making power. . . ." (emphasis added) (pp. 257-258)

It is respectfully submitted that under the cases decided by this court over a period of at least 75 years the word "statute" in section 1257 (2) and its predecessors has been deemed to include rules of conduct adopted by a state agency such as the one here involved.

It is therefore submitted that the court has jurisdiction over this case on this appeal. If it should be determined that it does not have jurisdiction under section 1257 (2) it is requested that *certiorari* be granted pursuant to § 2103 of title 28, U. S. C. See *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 236.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the validity of certain rules adopted by order of the Supreme Court of the State of Wisconsin on December 7, 1956, and on December 22, 1958 reported respectively in Volume 273 Wisconsin Reports on pages vii to xxv and in 5 Wis. 2d pp. 618, 627, 93 N. W. 2d 601, 605.

The first order promulgated for a period of two years certain rules and by-laws for an association to be known as "State Bar of Wisconsin" requiring attorneys to belong to said association. The second order continued said rules in effect indefinitely. The rules and by-laws, as continued in effect by the December 28, 1958 order, are attached to

the complaint and appear on pages 7 to 40 of the printed record.

Because of the length of the rules and by-laws they are not set forth at this point. However, portions of the rules and by-laws follow:

> "All persons licensed to practice law in this state are hereby organized as an association to be known as the 'State Bar of Wisconsin' . . ." (Rule 1, section 1)
>
> "No individual other than an enrolled active member of the State Bar shall practice law in this state . . ." (Rule 2, section 4)
>
> ". . . Every active member shall pay annual dues of fifteen dollars . . ." (By-laws, Article I, section 2)
>
> ". . . the Board of Governors by resolution shall suspend the membership of each dues delinquent member. . . . [N]o person whose membership is suspended for the non-payment of dues shall be entitled to practice law during the period of such suspension." (By-laws, Article I, section 3)

The following portion of the Fourteenth Amendment to the United States Constitution is involved:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION INVOLVED

This appeal presents the question of whether a state, under the Fourteenth Amendment to the United States Constitution, may coerce lawyers to belong to and support an association of lawyers. The question has a direct bearing upon the larger question of whether the state, under said amendment, may coerce any class of individuals to belong to an association.

As stated in the Notice of Appeal, the question involved is as follows:

> Do the orders and rules of the Supreme Court of the State of Wisconsin referred to at pages 7-8, *supra*, of this brief, and the rules and by-laws which were promulgated thereby deprive the appellant, who is a native of the State of Wisconsin and a residenct licensed practicing attorney in said state and has no income outside of that received from the practice of law, of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association functions substantially the same and carries on substantially the same work as voluntary associations of attorneys, and, among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders, rules and by-laws, insofar as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?

STATEMENT OF THE CASE

Parties

The appellant is a native of the State of Wisconsin, a resident of the City of Madison in said State, and is engaged in the practice of law as a member of a law firm in said city. He received a Bachelor of Arts degree from the University of Wisconsin in 1943, and after an interval for military service, was graduated from the Law School of the University of Wisconsin in February, 1948. (R. 1)

The appellant was licensed to practice law in the State of Wisconsin in February, 1948, after having complied with all of the requirements therefor, and has been so licensed and has practiced law in the City of Madison, Wisconsin ever since. (R. 1-2)

The appellant's only training and his only means of livelihood is as a lawyer. He has no income outside of that derived from the practice of law. (R. 2)

The appellee is a resident of the City of Fond du Lac, Fond du Lac County, Wisconsin, and is engaged in the practice of law in said city. He is the treasurer of an organization known as the "State Bar of Wisconsin," referred to on page 7, *supra*, of this brief. (R. 1)

Requirement of Membership in a Bar Association

Compulsory membership in a statewide bar association, described as an "integrated" bar association was considered by the Wisconsin Bar Association as early as 1923.[2]

---

[2]See history set forth in **Integration of Bar Case** (1943) 241 Wis. 8, 14, 11 N. W. 2d 604, 607.

In 1935 a bill for creation of a compulsory association of attorneys to be known as the "Wisconsin Bar Association" was passed by both houses of the legislature, but vetoed.[1] Bills for "integration" were introduced in the 1937, 1939 and 1941 legislatures, but failed of passage.[2] In 1943, a bill authorizing the Supreme Court of Wisconsin to provide for a compulsory association to be known as "State Bar of Wisconsin" was passed by both houses of the legislature, but was vetoed.[3] The veto was purportedly overridden, and the act was published as section 256.31, Wisconsin Statutes, which still remains in the Wisconsin Statutes and reads as follows:

> "256.31 *State Bar of Wisconsin.* (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.
>
> "(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the effiecient administration of justice."

---

[1] Ibid. See also Bill Jacket for Bill 119-S 1935 Legislature, Secretary of State's Office of State of Wisconsin.

[2] 244 Wis. p. 14, 11 N. W. 2d p. 607.

[3] 244 Wis. p. 16, 11 N. W. 2d 608. See veto message of Governor Walter S. Goodland at pp. 40a to 41a of the appendix to the jurisdictional statement.

A controversy arose as to whether the veto was validly overridden. The Wisconsin Supreme Court, in a self-advisory opinion, ruled that it was.[7] The court also ruled that the act did not delegate legislative powers and did not deny equal protection of the laws.[8] Justice Fowler dissented, stating that the court should not "integrate the bar of the state into an association or establish regulation for the conduct of the association's affairs."[9] He stated that if the act is valid, the legislature ". . . may, for like reason if there be any, organize the barbers and the plumbers and the machinists and the members of any other trade or class of workmen into a trade or labor union. . . ."[10]

No rules were considered, and the court decided not to adopt any rules at that time.[11]

In 1946 the President of the Wisconsin Bar Association petitioned for establishment of an integrated bar association. The court refused to order integration, stating that an integrated bar could not use its dues to maintain a legislative agent; that it doubted that it could conduct propaganda in defense of the legal profession; and that the court felt quite sure that it could not seek legislative definition of the boundary lines of the legal profession.[12]

In 1955, the movement for an "integrated" bar association was revitalized by Alfred E. LaFrance, President of the Wisconsin Bar Association. He urged that *all lawyers*

---

[7] 244 Wis. pp. 16-36, 11 N. W. 2d 609, 617.

[8] 244 Wis. pp. 36-45, 11 N. W. 2d 617-621.

[9] 244 Wis. 55, 11 N. W. 2d 625.

[10] 244 Wis. 56, 11 N. W. 2d 625.

[11] 244 Wis. 54, 56a-56b, 11 N. W. 2d 625, 12 N. W. 2d 699-700.

[12] **In re Integration of Bar** (1946) 249 Wis. 523, 529, 25 N. W. 2d 500, 502-503.

of the state should participate in legislative matters in determining the qualifications of attorneys, in problems of judicial administration, in judicial selection, in legal aid, in handling grievances and in a "vast program" of public relations. With respect to legislative work, he stated:

> "All of the lawyers of the state, through their association, should participate in making recommendations for changes and advancements in the procedural and substantive law of the state; *all of the lawyers of the state through their unified association, should actively participate in the molding of all future legislation and in promoting educational programs concerning proposed and considered constitutional changes.*"[12] (Emphasis added)

On petition by Mr. LaFrance and others, authorized by the House of Governors of the Wisconsin Bar Association, and alleging that only 68% of the lawyers in the state are members of the Wisconsin Bar Association,[13] the Wisconsin Supreme Court, in June 1956, directed that rules be drawn by the petitioners.[14]

The reasons given by the court for its order were that membership in the voluntary association had become static and that integration would result in registration of all lawyers practicing in the state.[15] All members of the court participating in the 1946 decision, except for one, had been replaced.

Rules for an integrated bar association were adopted by the court on December 7, 1956, with the provision that

---

[12] 28 Wis. Bar Bulletin, No. 5, p. 6 (Oct. 1955).

[13] (R. 2) See also 21 Wis. Bar Bulletin, No. 2, p. 21 (April, 1956).

[14] **In re Integration of Bar** (1956) 273 Wis. 281, 285, 77 N. W. 2d 602, 604.

[15] 273 Wis. pp. 284-285, 77 N. W. 2d 604.

they were to be in effect for a period of two years from January 1, 1957."

The court expressly stated that the rules were adopted pursuant to the court's "... inherent authority over members of the legal profession as officers of the court. ..." (R. 7) The court did not rely upon section 256.31 *supra*, although the same name, i.e., "State Bar of Wisconsin" was used.

On December 22, 1958, the Wisconsin Supreme Court continued the said rules, with minor changes made since 1956, in effect for an indefinite period of time.[16]

Nature and Activities of the State Bar of Wisconsin

The rules adopted by the Wisconsin Supreme Court commence under the heading *"Creation of Association."* (R. 7) and provide that all persons licensed to practice law in the state "are organized *as an association* to be known as the 'State Bar of Wisconsin.' ..." (R. 7) (Emphasis added)

"The purposes of the *association* ..." (emphasis added) include aiding the courts in carrying on and "improving the administration of justice"; fostering and maintaining learning, competence, and public service, and high standards of conduct; safeguarding "the proper professional interests" of attorneys, encouraging the formation and activities of "local bar associations"; and providing a forum for discussion of "subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the rela-

---

[16](R. 2-3) See also 273 Wis. vii et seq., 79 N. W. 2d 441-442.

[17](R. 3, 47) The opinion at pages 40 to 47 of the record is reported as **In re Integration of the Bar** (1958) 5 Wis. 2d 618, 93 N. W. 2d 601.

tions of the bar to the public, and to publish information relating thereto. . . ." (R. 8)

The rules consist of two parts, one denominated "State Bar Rules" (R. 7-26) and the other called "State Bar By-laws." (R. 27-40)

The principle distinction between the "rules" and the "by-laws" is that the rules may be changed only by the court while the 'by-laws" may be changed without prior court action by a referendum of the members or by action of two-thirds of the Board of Governors. (R. 26)

The rules give corporate character to the association—provide that it may sue and be sued, enter into contracts and hold and dispose of real and personal property. (R. 7-8)

Membership is defined by the rules as including all persons who are licensed to practice law in the State of Wisconsin, including those who are not residents. (R. 8) Every person licensed to practice law is required to enroll "by registering his name with the secretary of the association." (R. 8) Only active members may practice law. (R. 9) Dues not exceeding $20.00 per year are to be set by the by-laws. (R. 9-10) The rules provide that the board of governors may suspend the membership of any member who does not pay his dues (R. 10) and that no one shall be entitled to practice law during the period of suspension. The by-laws provide for membership dues at $15.00 per year (R. 28), and further provide the board of governors "*shall*" by resolution suspend the membership of any person who does not pay his dues, and that no one shall be entitled to practice law during the period of suspension. (R. 29)

All dues are required to be paid to the "treasurer of the *association* and shall constitute a fund for the payment of the expenses of the *association*." (R. 10) (Emphasis added)

The association has a president, president-elect, a secretary and a treasurer. (R. 10-11)

"The affairs of the *association*" (emphasis added) are managed and directed by a Board of Governors which consists of the officers of the association, the immediate past president of the association and 29 members elected from districts. (R. 12)

The Board of Governors meets at least four times a year (R. 14) and a seven-member Executive Committee carries on the functions of the Board of Governors between meetings. (R. 16-17)

The Board of Governors has the control over the finances. (R. 19)

Meetings of the association as a whole have power only to recommend action to the Board of Governors, or to initiate a referendum by a resolution adopted by an affirmative vote of at least 200 members. (R. 18)

An executive director and his staff assist the board, the officers of the association, and the chairmen of the committees and sections, and are paid out of the funds of the association. (R. 4, 39)

The association was intended to be a continuation of the Wisconsin Bar Association, under a new name with a revised governing body. The officers, governing body, and committee of the Wisconsin Bar Association ceased to func-

tion just prior to the time that the officers, governing body and committees of the State Bar of Wisconsin began to function. (R. 3) The Supreme Court appointed as initial general officers of the integrated association the same persons who were officers of the voluntary association. (R. 3; 273 Wis. Reports pp. vii to viii) The by-laws adopted by the Supreme Court provided that the integrated association was to select the American Bar Association delegates theretofor selected by the Wisconsin Bar Association and to select the members of the state Judicial Council previously selected by the Wisconsin Bar Association. (R. 34) The said by-laws provided that the integrated association is to publish the "Wisconsin Bar Bulletin" which was previously published by the Wisconsin Bar Association. (R. 4-5, 37) All of the files and property of the Wisconsin Bar Association were taken into the possession of the integrated bar association. (R. 3)

The integrated association carries on substantially the same work and functions in substantially the same manner as it did when it was a voluntary association and as does the American Bar Association. (R. 5)

The work of the association is in large part carried on under the direction of the Board of Governors by committees and sections which have a wide variety of duties and functions, including studying the curricula and teaching methods employed in law schools; promotion of programs for post graduate education of lawyers; recommending and examining changes in practice and procedure and in the judicial system; studying and making reports with respect to judicial selection, terms and compensation; recommending methods of enforcement of Cannons of Ethics and

amendments thereto; interpreting to other professions the "proper scope of the practice of law"; encouraging local bar associations to furnish legal aid; seeking elimination of unauthorized practice; advancing public acceptance of the objects and purposes of the association; studying, supporting and opposing proposals in the Wisconsin legislature and the United States Congress relative to changes with respect to the courts and "the practice of law"; and publication of a magazine, newsletter and calendar service. (R. 34-37) Among the fields included within the practice of law in which study is made and changes in substantive law are recommended, are laws relating to corporations, business, divorce and marriage, insurance, negligence, compensation, labor relations, the military, property and trusts and taxation. Sections are established for these fields. (R. 15, 37-38)

Another activity of the association comes under the head of Grievance Committees which are established for each district in which members of the Board of Governors are elected. (R. 20-25) Like certain voluntary county associations of recent years (Wis. Stats. § 256.28 (2a)), these committees are given the power to subpoena attorneys by the threat of disciplinary action on the part of the Supreme Court. (R. 21) The committees make recommendations to the State Bar Commissioners, an agency created by the legislature whose members are appointed by the court, which has had investigatory power since 1927 (Wis. Laws 1927 c. 314). The work of the committees does not supersede the authority of the State Bar Commissioners (R. 25-26), but it has reduced the budgetary requirements of the latter agency to the extent of about $400 per year. (R. 81)

One of the main objects and purposes of the integrated association is the promotion of law reform. (R. 5) In the course of this work the association has, without solicitation, opposed the adoption of legislation favored by the appellant, contrary to the appellant's convictions and beliefs. (R. 5-6)

To further carry out this work, the association uses its executive director as a registered lobbyist.[18] Ten per cent of the time of the executive director is devoted to lobbying on behalf of the association.[19]

Registration as a lobbyist and reports of lobbying activities are required only if there is an attempt "personally and directly to influence any member of the legislature. . . ." Wis. Stats. § 13.70.

The procedures of the association in the field of lobbying are set forth in a resolution adopted by the Board of Governors on June 12, 1957 which is printed on pages 42a to 46a of the Jurisdictional Statement. The Wisconsin Supreme Court commended the association for the adoption of this resolution. (R. 41-42) Under the resolution the board may delegate its prerogative to take positions on legislative matters to the committee on legislation, the president of the association, or to the association's legislative council. (page 44a, Jur. Stat.) The Legislative Counsel is required to register as a lobbyist and to screen "all legis-

---

[18]Minutes of Executive Committee, Jan. 24, 1959. The Wisconsin Supreme Court, in its opinion below took "judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956." (R. 72) Whatever constitutes a noticeable fact in the court below must likewise be a noticeable fact in the United States Supreme Court. **Adam v. Saenger** (1938) 303 U. S. 59, 63.

[19]Report of State Bar of Wisconsin dated June 6, 1960, and filed with the Wisconsin Secretary of State on June 7, 1960. This report may be judicially noticed. **Wis. Truck Owners Ass'n v. Public Service Comm.** (1932) 207 Wis. 664, 667, 242 N. W. 668, 674.

lative proposals" with the aid of committees and sections. (pp. 44a-45a Jur. Stat.)

In the opinion of the Wisconsin Supreme Court, below, judicial notice was taken of all of the legislative activities of the association and the court held that they are all related to "the administration of justice, court reform, and legal practice." (R. 72)

Some of the legislative activities are reflected in the minutes of the Board of Governors and the Executive Committee wherein it appears that the following types of legislation were supported or opposed. Proposals affecting the time for filing mechanics lien claims[20], supreme court justice salaries[21], a constitutional revision of the court system,[22] the pay of attorneys in the armed services[23]; the pay of attorneys in state service[24]; a revision by the legislature of the court system[25], a legal defender bill[26]; a bill affecting the right of courtesy[27]; supervision of intervivos trusts[28]; employment of law clerks by the Supreme Court[29]; venue for workmen's compensation cases[30]; repeal of integration of the bar[31]; a constitutional change permitting increase of

---

[20]Board of Governors Minutes, Oct. 31, 1959.

[21]Ibid, February 21, 1957.

[22]Ibid, Feb. 21, 1957.

[23]Ibid, Sept. 13, 1957.

[24]Ibid, June 11, 1958.

[25]Ibid, Feb. 18, 1959.

[26]Ibid, April 10, 1959.

[27]Ibid, April 10, 1959.

[28]Executive Committee Minutes, Dec. 12, 1958.

[29]Ibid, Dec. 12, 1958.

[30]Ibid, Dec. 12, 1958.

[31]Ibid, May 16, 1959.

judicial salaries during terms of office[32]; a proposal to elect Supreme Court justices by districts[33]; a family law bill which prohibits remarriage in certain circumstances and makes it a felony for an attorney to start certain actions[34]; a special appropriation of funds to the legislative council[35]; a comprehensive revision of the federal law relative to tax liens.[36]

The Board of Governors adopted and carried out the recommendations of a special committee on federal legislation which recommended that there be a sub-committee of the standing committee on legislation.

> ". . . to deal with Federal legislation affecting the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals or the creation of new Federal courts or judgeships affecting this state and comparable subjects; such sub-committee to acquaint itself with pending bills in that field, follow their progress in a general way, take steps to notify its members of the State Bar of the pendency, contents and progress of important bills which have a substantial chance of passing, and to recommend action by the State Bar with reference thereto."[37]

---

[32]**Ibid,** May 16, 1959.

[33]**Ibid,** June 10, 1959.

[34]**Ibid,** June 12, 1959.

[35]**Ibid,** May 13, 1960.

[36]Board of Governors Minutes, Dec. 11, 1959. Preparatory for the 1961 session of the legislature, the chairman of the legislative committee urged each section and committee chairman to forward to the legislative committee all drafts and proposals so that they will be ready in time for the 1961 legislature, and stated that a review is being made of all 1959-60 legislation which failed of passage. Board of Governors Minutes, July 22, 1960.

[37]Board of Governors Minutes, Dec. 11, 1959.

The public relations program includes promotion of a ladies' auxiliary (R. 6), publication in newspapers and pamphlets of informative articles on legal subjects (R. 78-79); and ". . . preparation and distribution of news releases covering the activities of the State Bar. . . ." (R. 79)"

Integration caused the income of the association to be doubled from $45,000.00 to $90,000.00. (R. 4)

The principal publication of the association, "The Wisconsin Bar Bulletin," prints papers and articles suggesting changes in the laws of the State of Wisconsin and the United States, biographical articles, articles discussing the present status of laws of the State of Wisconsin and the United States, advertisements of books, publications, trust services, life and health insurance and a variety of other matters. (R. 4-5)"

Payment of Dues Under Protest

In March, 1959, the appellant paid to the appellee, under protest, the 1959 dues required by the State Bar Rules. (R. 6, 47-48) This action was brought to recover said dues on the ground that the coercion by the rules of the Wisconsin Supreme Court to pay such dues violated the Fourteenth Amendment to the United States Constitution and certain state constitutional provisions. (R. 6-7)

"The expected expenditure for this program in 1960 is $3500 and the expected receipts $2000.00. Board of Governors Minutes Dec. 11, 1959. See also the Statement of Receipts and Disbursements for 1959 p. 47a, Jur. Stat.

"The June, 1957 issue of The Wisconsin Bar Bulletin, at page 57, for example, published a recommendation of the Military Law Section that compulsory teaching and study of the fundamental aspects and differences between the democratic system of government and the communistic systems be established in the state school systems.

Determinations of the Courts Below

On the demurrer to the Complaint, the Circuit Court held that no cause of action was stated on the ground that there is no right to practice law but only a privilege. The court held that the deprivation of a privilege does not deprive one of a constitutional right. (R. 62)

On appeal, the Wisconsin Supreme Court held:

(1) That the constitutional guarantee of freedom of association does not include the freedom not to associate. (R. 69-70)

(2) The right to practice law is not a right but a privilege subject to regulation so long as an unconstitutional burden is not imposed or due process is not denied. (R. 71)

(3) That the public welfare will be promoted by securing and publicizing the composite judgment of members of the bar of the state on measures directly affecting the administration of justice and the practice of law—that the general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. (R. 72)

(4) That when the court attempted to balance the public interests against First Amendment freedoms it found no interference with appellant's rights of free speech, assembly or petition. (R. 74). "The public interest . . . far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues. . . ." (R. 75)

(5) That the "State Bar" is a public agency which may be compared to the Judicial Council created by the 1951 Wisconsin Legislature. (R. 75-76)

(6) That the question of whether the creation of integrated organizations results in usurpation of power which in a democracy are exercised by parliament and by the courts "with resulting curtailment of the liberties of the people. . . ." ". . . is hardly pertinent with respect to the issue of constitutionality. . . ." (R. 76)

SUMMARY OF ARGUMENT

I. The Rules for Integration of the Bar Unjustifiably Infringe Upon the Right of Free Association.

The declaration in the United Nations Universal Declaration of Human Rights that "No one may be compelled to belong to an association" is inherent in the guarantees of liberty in the United States Constitution.

It is not cliche, as the Wisconsin court stated, to say that freedom of association includes a right not to associate as well as a right to associate.

From the beginning of this country, the right to freely move in and out of associations has been basic. The American Revolution was an ideological revolt as well as a struggle for independence—a revolt against many European practices such as the compulsory guild system.

In 1789 anyone would have been met with incredulity if he had asserted that government in this country could compel a man to belong to an organization which regulated the growth of his beard and the cut of his dress if he is to keep his job, as was the case with the English Inns of Court.

The people in the United States deliberately took a course which was distinct from that of the English. It cannot be said that the United States Constitution approved prevalent English practices.

The framers of the Bill of Rights expected that the concepts of liberty and property contained in the due process clause would have the broadest possible meaning. Madison maintained that a man had a property in his rights to his conscience, to his opinions and to the free use of his faculties which could not be curtailed by arbitrary restrictions, exemptions or monopolies.

Tocqueville, in his observation of Democracy in America, wrote that no legislature can attack the right of associati n without impairing the foundations of society.

The right of free association which had previously been protected by the United States Constitution as against federal action, became protected as against state action upon the adoption of the Fourteenth Amendment. The United States Supreme Court, on many occasions, has held that the Fourteenth Amendment protects the right of free association. In *Railway Employees Dept. A. F. L. v. Hanson* (1956) 351 U. S. 225, the court did not discuss or pass upon the right of free association. If it did pass upon the right of association, it was in error in not determining whether there was such a compelling and overriding interest in government that it became necessary to invade the right.

The right of free association extend to political, economic and religious matters. Indeed, the right extends into every field of human interest, just as does the right of speech and assembly. A person has a fundamental right

of "freedom of movement" in and out of associations with only the rarest of limitations.

The case where a man is forced to support an association with his money should be as rare as the case where he is forced to aid it with his speech. Only the gravest abuses endangering paramount interests permit an invasion of the right of free association. Mere legislative preference and beliefs are insufficient.

The Wisconsin Supreme Court gave as its reasons for integration the fact that attorneys are mere holders of a privilege, that the integrated association is a state agency, such as a judicial council, that membership in the voluntary asscoiation had become static, that integration would bring about a registration of lawyers, and that it is in the public interest to have the views of lawyers through their representatives expressed upon legislative matters. None of these reasons justifies invasion of the right of free association.

Under our system the practice of law is a right and not a privilege. This rights exists not only because of the right of a person to choose his own calling but also because it is essential for the protection of the rights of people to due process of law that they have an untrammelled choice of attorneys. The choice must be that of the accused or the litigant. The choice cannot be in the hands of the government.

However, whether the practice of law is a privilege or a right, the state cannot manipulate it so as to deprive those who are practicing law from their guaranteed freedoms.

Compulsory membership in and support of the association cannot be justified on the ground that the association becomes a state agency or a legislative committee, such as a judicial council. If it is such an agency or committee, it is because of the very compulsion which is at issue. In any event, it cannot be classified as a committee. The Court itself calls it an "association." Surely it is not a committee of Congress on the ground that it seeks to influence the course of bills in Congress, nor is it a committee of either the legislature or the court. The court stated that the association is to be free and independent.

The fact that the membership in the voluntary association had become static shows only a legislative preference. The lack of a current list of attorneys is no justification when registration can be accomplished through regular channels as through the office of the clerk of the court.

A striking answer to the court's assertion of a public interest in what the lawyers believe about legislation affecting the judiciary and the practice of law is the court's express refusal to grant a request that a poll be taken to determine what the lawyers think about the courts' own legislation compelling membership in the bar association.

Integrated bar associations are political associations—political parties. The principles of the State Bar of Wisconsin, as well as other integrated associations, in seeking improvement in judicial administration and reform in "substantive" laws relating to the practice of law, cover a wide field of endeavor. A major reason for requiring support of the association is that without such support proposals for reform and changes would not be adopted.

The danger of compelling membership in and support of any associations cannot be over emphasized. The precedent formed by compulsory associations of attorneys is extending into the fields of many different callings.

Instead of constituting a compelling reason for invading the rights of free association, the very purpose stated by the Wisconsin court as a reason for its action is a compelling reason why the constitutional right of free association should not be invaded.

II. The Compulsory Bar Unduly Invades the First Amendment Freedom of Free Speach.

The Wisconsin Supreme Court sustained the compulsory bar on the ground that it is in the public interest to secure and publicize the opinions of the majority of the bar on questions relating to the practice of law and the administration of justice. It held that the public and the legislature are "entitled to know" the stand of the profession on such matters and that the compulsory bar can obtain the opinions more effectively than a voluntary bar. The court further found no invasion of freedoms saying the plaintiff was as free to speak as he was before the compulsory membership and the compulsory payment of dues.

First Amendment freedoms are in fact restricted. The member who wishes to remain silent cannot do so because by the mere fact of his compulsory membership and compulsory dues he has supported the stand of the majority. And if he disagrees with the majority he cannot remain silent and retain a free conscience. True he may resign, but the price—his profession and livelihood—is too high for a

free conscience. Thus the right *not* to speak is substantially impaired.

The rights of the member who wishes *to* speak are also invaded. If his views are contrary to the majority, his voice is stilled at least to the extent that it is less effective because of the forced amplification of the voice of the majority. Mass voice replaces our system's emphasis upon and the dignity of the individual voice.

And, the voice of the individual who wishes to speak is stilled by a more subtle force. The amplified majority voice broadcast through the Board of Governors of the bar, becames the "official" or the "orthodox" voice. A dissident must either remain silent on a matter contrary to his convictions and probably thereby become identified with the majority, or speak and become unorthodox. This tends toward discouragement of the exercise of freedoms. So the voice of the one who wishes *to* speak is minimized by the mass voice, and the voice of the dissident tends to become silent because of the disinclination to be unorthodox.

The public, too, is denied First Amendment freedoms. It is entitled to be free *from* the "securing and publicizing" by the government of the opinions of any group on any subject. The marshalling of private opinions for public use is not the business of our government. And private opinions are not the subject of public muster.

Absent the most compelling circumstances, the government is not in the least concerned with what one thinks or with an individual's opinion on any subject.

This case, then, involves, in effect, forced affirmation of opinion, or, as an alternative, an unfree conscience or a

sacrifice of one's profession. Forced affirmation is rarely sustained by this court. And here the "end" is opinion itself.

The public interest here is not even meager, much less compelling. No great evil or danger is involved; no stoppage of public obligations or functions. Only that the "majority voice" will be for the public good.

And the compulsory bar asssociation, in fact, is *not* in the public interest. If it tends to still the voice of those not in the majority, as surely it will, the public interest will suffer.

ARGUMENT

I. THE RULES FOR INTEGRATION OF THE BAR UNJUSTIFIABLY INFRINGE UPON THE RIGHT OF FREE ASSOCIATION GUARANTEED BY THE FOURTEENTH AMENDMENT.

A. The Holding of the Wisconsin Supreme Court That the Fourteenth Amendment Does Not Guarantee Freedom Not to Join Associations is Erroneous.

1. *Since the Beginning of This Nation the Right to Freely Move In and Out of Associations Has Been Deemed to Be a Basic Right Which May Not Be Impaired By Government.*

The Wisconsin Supreme Court disagreed with the appellant's assertion that the right not to belong to an association is protected by the Fourteenth Amendment. It rejected the statement in *Pappas v. Stacey* (1955) 151 Me.

36, 117 Atl. 2d 497, 500, that "Freedom to associate of necessity means as well freedom not to associate. . . .", as "cliche." (R. 70)

The framers of the United Nations Universal Declaration of Human Rights, however, deemed the right not to join to be coextensive with the right to join. Article 20 of said declaration provides:

> "1. Everyone has the right to freedom of peaceful assembly and association.
>
> "2. No one may be compelled to belong to an association."

A statement in the Virginia Declaration of Rights adopted on June 12, 1776[40] which is substantially copied in Section 22, Article I, Wis. Constitution, says that ". . . no free government or the blessings of liberty can be preserved to any people but . . . by frequent recurrence to fundamental principles."

We submit that the history of our nation shows that the American Revolution was an ideological revolt as well as a struggle for independence—a revolt which made it clear to the people at the time that compulsory membership in organizations was not a part of the American system.

In the middle ages craft guilds, with compulsory membership as "the first rule," flourished throughout Europe.[41]

---

[40]Rutland, Robert Allen. **The Birth of The Bill of Rights, 1776-1791.** The University of North Carolina Press (1955) Appendix A.

[41]Grant, J. A. C., Univ. of Cal. **The Gild Returns to America,** Vol. 4. The Journal of Politics, pp. 303-309.

Corresponding to the craft guilds were the Inns of Court, which where the compulsory organizations for lawyers."

Freedom from the compulsory guild system was a much sought after fundamental right by the latter part of the 1700's.

Louis XVI, in 1776, gave freedom to "trades and professions" declaring that the "allurement of these fiscal advantages . . . concealed the immense injury they did to industry and their infraction of natural rights. . . ."

The edict stated that the illusion had

> ". . . extended so far that some persons asserted that the right to work was a royal privilege which the King might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all." . . . He, therefore regards it "as the first duty of his justice, and the worthiest act of benevolence to free his subjects from any restriction upon this inalienable right of humanity." Quoted by Justice Field in the dissenting opinion joined by Justices Chase, Swayne and Bradley in *Slaughter House Cases* (1873) 16 Wall. 36, 110, 21 L. ed. 395, 419.

The compulsory guild system did not secure a firm foothold in the American colonies.[42] By the same token, the compulsory Inns of Court did not take root in the American colonies, although there was a tendency just prior to

---

[42] Pound, Roscoe, **The Lawyer from Antiquity to Modern Times** (1953) pp. 99-100.

[43] **Grant, supra, note 41, page 309.**

the revolution to have bar meetings and some lawyers clubs in the New England area." A hostility toward organizations of callings existed." French ideas were preferred to things English."

Among the declarations in the Virginia Declaration of Rights of 1776 was the statement "That the people have a right to uniform government; and therefore no government separate from, or independent of *Virginia* ought to be erected or established within the limits thereof."[1]

This declaration is to be contrasted with the statement of the appellee that the "integrated bar" is more appropriately called "The Self-Governing Bar,"[2] and with the statements of the court below that within the realm of the rules and by-laws the court is devoted ". . . to the ideal of a free and independent bar." (R. 47, 73)

Any one were to state to a member of the first session of the United States Congress that a free government could establish a compulsory guild system or some compulsory Inns of Court, he would be met with incredulity.

---

[1]**Pound, supra,** note 42, pp. 164-172. The son of John Jay, related that there was an agreement among lawyers in New York not to take into their offices as clerks any young man who intended to enter the profession and that Jay's father took measures to secure a legal education for his son in London. By the time Jay was ready to study law, however, the agreement was abandoned and he studied in a New York law office. William Jay, **The Life of John Jay** (1833) Vol. 1, p. 14.

[2]**Ibid,** p. 177.

[3]**Ibid,** 181. France unselfishly without hope of gain had supported the American revolutionary cause to such an extent that the financial difficulties caused thereby led immediately to the Revolution of 1889. Guthrie, William D. "America's Debt to France—the Most Unalienable Gratitude" (New York City 1916) p. 9.

[4]**Rutland, supra,** note 40, Appendix A.

[5]Motion to Dismiss Appeal, p. 16.

Congressman Sedgwick, of Massachusetts, had such a reaction, on August 15, 1789, when the First Amendment was under consideration. The right of assembly, he said, was a "self-evident unalienable right" that to include such a right in a declaration of rights was like declaring ". . . that a man should have a right to wear his hat if he pleased, that he might get up when he pleased and go to bed when he thought proper . . ." and that it was derogatory to the dignity of the house to descend to such "minutiae" ". . . in a government where none of them were intended to be infringed."[10]

Such was the feeling as to the rights of liberty which existed in this country at the same time that a man's job could be taken from him in England unless he belonged to an association which regulated the growth of his beard and the cut of his dress.[11]

The people who forged the United States Constitution and the United States Bill of Rights deliberately took a course which was distinct from the English. The rights of conscience were no part of the inherited English law. The colonists went beyond their forebears in drafting laws and constitutions after 1775. The Americans of 1776 drew on a rich background of knowledge accumulated from England ". . . but in going through their hands it was fused with newer ideas and the results of their own experiences. . . ."[12]

---

[10] 1 Annals of Congress, p. 759 (1834).

[11] See Appellee's Motion to Dismiss, page 13.

[12] Rutland, supra, note 40, page 12.

As was stated in the argument of prevailing counsel in *Ex parte Milligan* (1866) 4 Wall 2, 66-67,

> ". . . our fathers . . . determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won, they threw not an atom away. The went over *Magna Carta*, the *Petition of Rights*, the *Bill of Rights*, and the rules of the *common law*, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. . . ."

This court stated almost twenty years ago:

> ". . . Ratified as it was while the memory of many oppressive restrictions on the enumerated liberties was still fresh, the First Amendment *cannot reasonably be taken as approving prevalent English practices.* . . ." *Bridges v. California* (1941) 314 U. S. 252, 256. (Emphasis added)"

Again it is stated in *Kingsley Corp v. Regents of N. Y.* (1959) 360 U. S. 684, 698, (concurring opinion) that British law and British practice ". . . have little relevance to our problem. . . ."

The law of England is not "specially favourable to free speech or to free writing." For example, the denial of the truth of the Scriptures by anyone educated in Christianity

---

"As in the case now before this court, the Bridges case involved an allegedly common law court practice.

". . . is by statute a criminal offense entailing very severe penalties. . . ."[9]

Although the first eight amendments to the United States Constitution specified certain rights, those rights which were not specifically named were not thereby excluded.[10] A guarantee of the right of liberty and property, in the broadest of terms, was inserted in the Fifth Amendment (and later in the Fourteenth Amendment)—the due process clause. *DeJonge v. Oregon* (1937) 299 U. S. 353, 364.

The framers of this provision did not expect that the concepts of liberty and property referred to therein would have a narrow meaning. On the contrary, they expected it would have the broadest of meaning—that it would protect the full range of individual rights. Madison, the "father" of the Bill of Rights, regarded property as not merely land or goods or money. He said that man has a property in his opinions and the free communication of them, in the safety and liberty of his person and in the free use of his faculties. A man may be ". . . said to have a property in his rights. . . ."[11]

Madison stated that the power of the government to pay public debts and enforce private debts ". . . can give no title to invade a man's conscience, which is more sacred

---

[9]Dicey, A. V. **Introduction to the Study of the Law of the Constitution** (6th Ed. 1902, London) pp. 236, 241-242.

[10]Madison was concerned about an enumeration. He said ". . . my own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. . . ." **Letters and Other Writings of James Madison,** published by Order of Congress (1865) Vol. 1, pp. 421-424.

[11]**Letters and Other Writings of James Madison** (1884) Vol. IV, pp. 478-479 —Essay on Property, dated March 27, 1792.

than his castle . . . ,"[9] and that ". . . is not a just government . . . where arbitrary restrictions, exemptions and monopolies deny to part of its citizens that free use of their faculties and free choice of their occupations. . . ." If there be a government, Madison stated, which ". . . violates the property which individuals have in their opinions, their religion, their possessions and their faculties . . ., such a government is not a pattern for the United States."[10]

Madison, in referring to the monopolies and restrictions upon the use of one's own faculties must have had in mind the European guild system.

Ideas similar to those expressed by Madison are found in proposals by the (1788) conventions of Virginia, New York and North Carolina of a Bill of Rights for the United States which would guarantee the enjoyment of life and liberty and the pursuit of happiness. The conventions of Virginia and North Carolina would add the phrase ". . . with the means of acquiring, possessing, and protecting property. . . ."[11]

The protection of liberty and property in the Bill of Rights adopted by the respective states and the United States was intended to invalidate government acts compelling a man to belong to a guild as a condition for the use of his faculties.

From the beginning of this country, freedom *not* to join an association, as well as freedom to join an associa-

---

[9] Ibid.

[10] Ibid.

[11] The Federalist, edited by Paul L. Ford (1898) pp. 635, 639, 646.

tion was an inherent and inalienable right protected by the Constitution of the United States and of the several States.

Tocqueville in his observation of democracy in America stated: "The right of association . . . appears to me almost as inalienable in its nature as the right of personal liberty. No legislature can attack it without impairing the foundations of society. . . ."[9] He said, the members of European associations ". . . respond to a watchword, like soldiers on duty. . . ." while in America ". . . [n]o one abjures the exercise of his reason and free will. . . ."[10]

There were, however, threatened invasions of the freedom of association. One occurred in 1794 when a large number of the members of Congress became upset with the "Democratic Societies" and were considering a resolution censuring them, much as a modern day congress might employ an attorney general's "list" for purpose of censure. Madison was greatly alarmed at this proposed governmental interference and stated that the "citadel" of the liberties of the people is menaced."[11]

The threats to freedom were repelled.

> "Freedom of private association was a value built sturdily into our habits of life. This was the fact that gave vitality to constitutional declarations of rights of assembly and petition. . . ."[12]

---

[9]Tocqueville, Alexis De, Democracy in America, translated by Henry Reeve, Esq., Revised by Francis Bowen (5th Ed. 1862), Vol. I, Chapter 12, p. 248.

[10]Ibid. pp. 250-251.

[11]Letter of James Madison to Thomas Jefferson, Nov. 30, 1794; Letters and Other Writings of James Madison (1884) Vol. II, p. 22. Compare Joint Anti-Fascist Refugee Comm. v. McGrath (1951) 341 U. S. 123.

[12]Hurst, James Willard, Law and the Conditions of Freedom in the Nineteenth Century United States, p. 35.

2. *The Right of Free Association Is Protected From State Action By the Fourteenth Amendment.*

The guarantee of freedom of association contained in the First and Fifth Amendments is prohibited from state encroachment by the Fourteenth Amendment. See *United States v. Hall* (C. C. S. D. Ala. 1871) Fed. Case No. 15, 282, Circuit Judge Woods presiding, holding that the rights guaranteed by the first eight amendments were embraced by the Fourteenth Amendment. The ideas expressed in the *Hall* case were carried into the dissents of four justices in the *Slaughter House* case (1873) 16 Wall. 36, 83-131; the concurring opinions of four justices in *Butchers' Union etc. Co. v. Crescent City, etc. Co.* (1883) 111 U. S. 746, 754-760; and the opinion of the entire court in *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 589-590. See also the dissent of Justice Harlan in *Patterson v. Colorado* (1907) 205 U. S. 454, 463-466.

The United States Supreme Court has on numerous occasions protected the right of freedom of association against state action.

In *Fiske v. Kansas* (1926) 274 U. S. 380, it held invalid a state law penalizing the solicitation of persons to become members of a workers industrial union.

In *Staub v. Baxley* (1958) 355 U. S. 313 the court held that a city could not license solicitation for membership in an organization.

In *NAACP v. Alabama* (1959) 357 U. S. 449, 462, the court held to be invalid a state statute designed to cause an association to reveal the names of its members on the

ground that inviolability of privacy in group associations may be indispensible ". . . to preservation of freedom of association. . . ."

In *Bates v. Little Rock* (1960) 361 U. S. 516, the court treated freedom of association on the same plane as the right of assembly; the concurring opinion expressly stating that freedom of assembly includes freedom of association.

In *Watkins v. United States* (1957) 354 U. S. 178, 182, the court stated in reference to congressional inquiries that ". . . First Amendment freedoms of speech, press, religion or political belief and association [cannot] be abridged. . . ."

In *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 250, four members of the court stated in reference to state legislative inquiries that the right to engage in ". . . political . . . association . . ." is enshrined in the First Amendment and that ". . . Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. . . ."

In *Konigsberg v. State Bar of California* (1957) 353 U. S. 252, 273, the court held that a state cannot select its lawyers ". . . in such way as to impinge on the freedom of political expression or association. . . ."

In *Schware v. Board of Bar Examiners* (1957) 353 U. S. 232, 239, the court stated that a member of the Republican party cannot be excluded from the practice of law merely because he is such a member.

In *Wieman v. Updegraff* (1952) 344 U. S. 183, 191, the court held that the state could not make the mere fact of "association" determinative of whether a teacher may be

employed by the state. The court stated "... To thus inhibit individual *freedom of movement* is to stifle the flow of democratic expression and controversy at one of its chief sources. . . ." (Emphasis added)*

3. *The* HANSON CASE *Did Not Pass On the Right of Free Association.*

In *Railway Employees Dept. A. F. L. v. Hanson* (1956) 351 U. S. 225, the court had under consideration a federal statute which legalized agreements requiring persons to support an association as a condition to their right to be employed by parties affected by the agreement. The court, while discussing the right of one to be employed, did not discuss or pass upon the right of free association. It simply treated the right to employment as a property right which may be regulated under the police power.

If the *Hanson Case* did decide that there was no violation of the guarantees of freedom of association in that case, we submit that the holding should be reconsidered; for it would appear to be contrary to the entire tenor of thought existing at the time of the adoption of the United States Constitution and Bill of Rights. Furthermore, if it made such a decision it erred in not determining whether there was such a subordinating compelling interest on the part of the government so as to permit it to invade the right of free association. *NAACP v. Alabama* (1959) 357 U. S. 449, 463.

*See, however, the opinions of a divided court in Uphaus v. Wyman (Nov. 14, 1960 #336) 29 L. W. 4027; Uphaus v. Wyman (1959) 360 U. S. 72; Barenblatt v. United States (1959) 360 U. S. 109; Fleming v. Nestor (1960) 363 U. S. 603 wherein it appears from the dissenting opinions tha the use of censure by the government is curtailing said "freedom of movement." See also page 38, supra.

4. *The Right of Free Association Extends Into All Fields of Human Interest.*

The right of association extends to political, economic and religious matters. *NAACP v. Alabama* (1959) 357 U. S. 449, 460-461. Included within economic matters are matters relating to one's own occupation. This was the right protected in *Fiske v. Kansas* (1926) 274 U. S. 380. Indeed, the subjects of free association are every bit as extensive as that of free speech, with respect to which it is held that such rights ". . . are not confined to any field of human interest. . . ." *Thomas v. Collins* (1945) 323 U. S. 516, 531. Cf. *Cammarano v. United States* (1959) 358 U. S. 498, 513-514 (concurring opinion).

5. *Conclusion*

In conclusion, it is submitted that it is not "cliche" to say that if a man has a "right" to wear a hat, he must necessarily have a right not to wear it. If he has a right to speak, he necessarily has a right not to speak. If he has a right to support or join an association, he has a right not to do so. To say otherwise is to translate rights into requirements.

The Fourteenth Amendment guarantees the right of freedom of association with respect to every field of human interest. Freedom of association of necessity means that each person has the option of determining whether he shall associate *or shall support* an association.

A person has a fundamental right of "freedom of movement" in and out of associations. *Weiman v. Updegroff, supra,* 344 U. S. p. 191.

Essentially, this is what Judge Cooley had in mind when he said that it is not a proper function of government to require attendance upon the sports of the majority, the political meetings of the majority or the church of the majority."

It is respectfully submitted that the Supreme Court of Wisconsin was in error in determining that the right not to be compelled by government to support an association is not guaranteed by the Fourteenth Amendment.

B. There Is No Justification for Invasion of the Freedom of Association In This Case.

1. *Only the Most Unusual and Compelling Circumstances Justify Invasion of the Right of Free Association.*

The case where a man is forced by the state to aid an association with his money should be as rare as the case where he is required to aid the association with his speech.

As in the case of assembly and speech, the rule with relation to freedom of associations should be that ". . . Only the gravest abuses, endangering paramount interests give occasion for permissible limitation. . . ." *Thomas v. Collins* (1945) 323 U. S. 516, 530.

". . . Mere legislative preferences or beliefs. . . ." *Schneider v. State* (1939) 308 U. S. 147, 161, or "conserving

---

"Story's Commentaries on the Constitution of the United States (5th ed.) (1891) Vol. 2, Chapter XLVII by T. M. Cooley, Section 1939, p. 689.

of desirable conditions," *Cantwell v. Connecticut* (1940) 310 U. S. 296, 308 ". . . encouragement to loyalty. . . ." *Spieser v. Randall* (1959) 357 U. S. 513, 527-528, or public aims which are merely important, *Buchanan v. Warley* (1917) 245 U. S. 60, 81, are not sufficient to justify infringement of First Amendment freedoms.

There must be a substantive evil that arises ". . . far above public inconvenience, annoyance or unrest. . . ." *Terminiello v. Chicago* (1949) 337 U. S. 1, 4.

In short, in order to sustain the encroachment upon freedom of association, the state must show ". . . a subordinating interest which is compelling. . . ." *Bates v. City of Little Rock* (1960) 361 U. S. 516, 524.

The state has the "heavy burden" of demonstrating that the invasion is justified. *Burstyn v. Wilson* (1952) 343 U. S. 495, 504.

The Wisconsin Supreme Court has given five reasons why it should compel all attorneys to belong to the bar association, namely:

(1) That attorneys are merely holders of a privilege as officers of the court. (R. 70-71)

(2) That the integrated association is an agency of the state, much as a judicial council. (R. 75)

(3) That membership in the voluntary association has become static and a large minority has refused to become associated with the association. (273 Wis. 281, 283, 77 N. W. 2d 602, 603)

(4) That the court has no current list of attorneys. (273 Wis. 281, 284, 77 N. W. 2d 602, 604)

(5) That the public has an interest in what the composite judgment of attorneys is on a broad range of public policy matters. (R. 72, 75)

Each of these reasons is hereinafter discussed. It is submitted that whether taken singly or all together they do not constitute a compelling subordinating reason for invading the right of free association.

2. *Attorneys Are Entitled To Constitutional Protection of Freedom of Association As Well As Other Persons.*

a. The court below justified its action, in part, on the ground that the practice of law is a privilege.

The inference may be drawn that the court below was of the opinion that there is little in the way of constitutional prohibitions affecting its action, since the practice of law is not a right but only a "privilege" as attorneys are "'. . . essentially and primarily . . . officers of the court. . . .'" (R. 70-71) For this reason the court appears to say that only the most general limitations apply to its regulations. An example given is the burden of unconscionably high dues. (R. 71, 74-75)

b. Integration of bar associations is widely justified on the ground the practice of law is only a privilege.

The idea that the practice of law is merely a privilege and that there are very little, if any, constitutional rights

with respect to any rules or laws that may require persons to act in a certain way as a condition for retaining the privilege, has frequently been advanced as the reason why integration of bar associations is valid. See the holding of the Circuit Court below (R. 62); *Ayres v. Hadaway* (1942) 303 Mich. 589, 6 N. W. 2d 905, 907-908. *Petition for Integration of Bar* (1943) 216 Minn. 195, 12 N. W. 2d 515, 518; *In re Scott* (1930) 53 Nev. 24, 292 P. 291, 295.

The "father" of the integrated bar, Herbert Harley, stated that a lawyer is merely a ". . . privileged officer of the state . . ." who has no ". . . no right under natural law, or under common law or under any constitution, to be a lawyer. . . ." ;[11] and that the state can restrict to any extent the number of lawyers, can forbid a union of lawyers, and can discharge lawyers at the end of any annual term.[12]

c. The practice of law should not be described as a privilege under a constitutional government such as that in the United States.

In this country it is wholly inappropriate to refer to the practice of law as a "privilege."

Perhaps more than any other calling, attorneys are essential to our way of life.

The name "attorney" which is used so much in the United States, contrary to other countries, is symbolic. An

---

[11]Vol. 8, Journal Am. Jud. Soc., (Oct. 1924) p. 74.

[12]Harley, Herbert "Bar Integration Is a National Movement," Vol. 8, Law Society Journal, pp. 80, 88 (May, 1938).

attorney is an agent—not of government, but of the private individual who seeks his help.

This principle is written into the Wisconsin Constitution which provides that "Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an *attorney or agent of his choice.*" (Art. VII, sec. 20, emphasis added) It is to be emphasized that the attorney or agent is of the *choice of the suitor—not the government.*

This principal is an unfailing part of the due process clauses of the Fifth and Fourteenth Amendments. This court unanimously held in *Chandler v. Fretag* (1954) 348 U. S. 3:

> ". . . Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through *his own counsel was unqualified.* . . ." (348 U. S. p. 9)
>
> ". . . *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.* . . ." *Powell v. Alabama* (1932) 287 U. S. 45, 69, quoted in the *Chandler case, supra,* p. 10.

The only persons who can effectively vindicate the constitutional rights of litigants[*] to employ counsel of their own choice are those who have gained reasonable educational and character qualifications to act as an attorney.

---

[*]Compare **NAACP v. Alabama** (1959) 357 U. S. 449, 459-460.

Even those courts which use the term "officer of the court," are careful to qualify the term by saying that an attorney is not an officer[4] of the state. *Ayres v. Hadaway* (1942) 303 Mich. 597, 6 N. W. 2d 905, 908.

In *In re Galusha* (1921) 184 Cal. 697, 698, 195 Pac. 406, the court stated that ". . . attorneys are not public officers but are engaged in a private profession. . . ."

In *Ex Parte Yale* (1864) 24 Cal. 241, 243-244, the court held that an attorney ". . . is not an officer in the constitutional sense of the term, and does not hold a public trust. . . ." And is subject to regulation ". . . subject to the same limitations as in the case of any other business or profession. . . ."

In *Cammer v. United States* (1956) 350 U. S. 399, 405 the court held that an attorney ". . . is engaged in a private profession, important though it be to our system of justice. . . ."

Indeed, because of the importance to "our system of justice" it necessarily has to be primarily a private profession. The right to follow "any lawful calling, business or profession . . . is a distinguishing feature of our republican institutions." *Dent v. West Virginia* (1889) 129 U. S. 114, 121.

An attorney cannot at the same time be an arm of the state or subject to the whim of the state or its agencies, and wholly and effectively guard the rights of a citizen of

---

[4]It seems incongruous to regard attorneys as public officers when they need not be residents of the state. (R. 8)

lesser knowledge who comes to him for help. He cannot serve two masters.

The practice of law is an important constitutional right —not a privilege. Cf. *Royall v. Virginia* (1886) 116 U. S. 572, 583.

d. The right of an attorney to freely associate is not dependent upon concepts of right or privilege to practice.

Regardless of whether practice of law is a right or privilege, such practice cannot be regulated so as to deprive attorneys of constitutional freedoms. *Ex Parte Garland* (1867) 4 Wall. 333, 379-380; *Schware v. Board of Bar Examiners* (1957) 353 U. S. 232, 238-239; *Green v. McElroy* (1959) 360 U. S. 474, 492. See also *Frost Trucking Co. v. Railroad Comm.* (1926) 271 U. S. 583, 593-594.

In the *Garland case* the court stated the legislature may prescribe qualifications for the "office" of attorney ". . . as it may . . . prescribe qualifications for the ordinary avocations of life. . . ." (pp. 379-380); but it cannot be used as a means of "punishment"* for an act which is not otherwise punishable because of constitutional provisions.

In the *Schware case* the court refrained from determining whether the petitioning attorney had been denied the right of free political association (353 U. S. p. 243, note 13), but on the general question of whether a valid qualifi-

*In the case now before this court, the penalty of loss of occupation if the association is not supported is much greater than fine of many thousands of dollars.

cation was required of him, it held that it made no difference whether the practice of law is a right or privilege—that it certainly was not a matter of grace. (353 U. S. 239, note 5)

In conclusion, it is respectfully submitted that there is no reason for saying that attorneys have less constitutional rights of freedom than those persons in other professions and callings.

2. *Constitutional Rights of Freedom of Association May Not Be Invaded By Describing the Integrated Association As a State Agency Or An Arm of the State.*

The court below described the integrated association as an agency of the state and compared it with the state Judicial Council. (R. 75)

It was intended by the Wisconsin Supreme Court that the integrated bar association be a continuation of the voluntary association. (*Supra* pp. 16-17)

The only substantial difference in the association before and after integration is the compulsory feature. (R. 5) This is true throughout the country:[70]

> ". . . The outstanding characteristic of the integrated bar is that all lawyers who engage in the practice are compelled to become members and pay an annual fee, either as a result of statutory requirement or by rule of the Supreme Court. . . ." Barkdull, Howard L., "Methods of Strengthening Bar Associations," 35 Jour. Am. Jud. Soc. (June, 1951) 9, 13.

[70]Giles, Clarence F., An Analysis of the Integrated Bar, 17 Albany Law Review, pp. 231, 235 (1953). Wicker, William, 21 Tenn. Law Rev. 708 (1951).

The integrated bar association is described as an "association" throughout the Rules and By-laws more than 60 times. Section 1, Rule 1, of the Rules provides that all persons licensed to practice law in the state are "organized *as* an association." (R. 7) (Emphasis added)

To say that the integrated bar association is an agency of the state is merely to make the fact of compulsion the reason for its validity.

If a judicial council is a valid creation by the legislature, it is because it is in the nature of a committee of the legislature. An association organized along the lines of a calling which seeks changes by Congress, the legislature or the courts (*Supra* 16 to 22) can scarcely be considered as a committee of Congress or of the legislature or of the court, particularly when Congress, the legislature and even the court does not supervise its activities. (R. 46-47, 73) Cf. *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 255. To call the association a state or federal committee is, again, merely to make the fact of compulsion the reason for its validity.

4. *The Fact That the Voluntary Association's Membership Had Become Static and the Fact That the Court Had No Current List of Attorneys Are Not Overriding Reasons.*

In the opinion announcing its intent to "integrate the bar," the Wisconsin court noted that previously it had advocated wholehearted support of the "voluntary association," but that the membership of the voluntary association has been static and that ". . . a substantial minority

of the lawers in the state *are not associated* with the State Bar Association. . . ." *In re Integration of Bar* (1956) 273 Wis. 281, 283, 77 N. W. 2d 602, 603. (Emphasis added)

Obviously the court felt that it should compel the minority to become "associated" with the association.

Another reason given was that "integration" will accomplish the registration of all lawyers now practicing in the state. 273 Wis. pp. 284-285, 77 N. W. 2d p. 604.

These reasons do not measure up to the importance required for overriding a basic constitutional liberty.

Requiring a person to become associated with an association simply because not all persons who are eligible have joined is nothing more than a mere legislative preference or belief.

Registration of lawyers is not a compelling subordinating interest which requires compulsory membership in an association, when it can be easily accomplished through regular channels, as through the office of the Clerk of the Supreme Court.

5. *A Belief That the Public Is Entitled to Know How Attorneys Feel On Legislative Proposals Is Not a Compelling Reason Justifying the Invasion.*

a. The court below stated that the public is entitled to know how a majority of the attorneys feel on a great variety of public questions.

The Wisconsin court, in the opinion announcing its intent to "integrate" the bar association, 273 Wis. p. 283, 77 N. W. 2d 604, cited *Petition of Florida State Bar Association*

(Fla. 1949) 40 So. 2d 902. In that case, the court held that the purpose of bar integration ". . . is not discipline" for unethical conduct, but to alert the Bar to professional and public responsibility. . . ." (p. 908)

The Florida court pointed to the California State Bar as a good example, stating that it had a public relations program and ". . . in matters improving the administration of justice, the integrated bar of California prepares and fosters bills in the Legislature. . . ." (p. 905), and that "Bar integration grew from a felt necessity *for an organization that could speak for the profession in esse.* It is not a compulsory union but a necessary one to secure the *composite judgment* of the bar on questions involving its duty to the profession and the public. . . ." (p. 908). (Emphasis added)

The Wisconsin court in the instant case gives the same reason for compelling lawyers to become associated with an association of lawyers as the Florida court did, again citing the Florida case. The Wisconsin court stated:

> "We are of the opinion that public welfare will be promoted by securing and publicizing the *composite judgment* of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of legislation. . . ." (R. 72) (Emphasis added)

The court ". . . has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with

---

". . . [T]he principle object of whole bar organization, and the most impelling justification for its accomplishment is not discipline. . . ." Webb, F. W. C., **Whole Bar Bar Organizations—A Necessity,"** 29 Journal Am. Jur. Soc. 38, 43 (August, 1945).

respect to legislation affecting the administration of justice and the practice of law. . . ." (R. 74-75)

b. The court below felt no need to learn what a majority of the attorneys felt about a compulsory bar association.

A striking rebuttal of any assertion that the claim of a need to have public expression of the views of a majority of the lawyers of the state with respect to matters affecting the administration of justice and the practice of law, is that the court felt no need to have public expression of the views of the majority of the lawyers of this state as to whether there should be an integrated bar. Although it was strongly urged that a poll be taken of the lawyers on this question, the court refused to have one conducted on this question, saying:

". . . Such poll, of course, would be informative but would not be determinative. Responsibility for creating and continuing the integrated State Bar of Wisconsin belongs to the court and its continuation must always rest in the judgment of the court. . . ." (R. 45-46)

If there is a compelling need to have the views of the lawyers on other questions relating to the courts, why wasn't there a compelling need to have the view of the lawyers on integration?

The fact is that there is no compelling need to have the "composite judgment" of attorneys on matters of pub-

lic policy. There is only a desire which is shared by some under some circumstances and is not shared by others.[72]

c. The intended effect of integration is to increase the influence of the association upon the legislature and the people in carrying out the aims and principles of the association.

Those of independent minds who dislike the bar association and for what it stands need not participate except for putting their names on the rolls and making the required payments. (R. 74-75) However, the very fact that the association has the additional names and the additional money, and thus has the additional attorneys associated with it, places it in a powerful position with respect to influencing the people and the legislature in advancing the purposes of the association. These purposes, which may be called its aims and principles, are to improve the administration of justice[73] to safeguard the proper professional interest of members of the bar and to promote the science of jurisprudence and law reform. (R. 5, 8)

The advantage of additional influence resulting from integration is universally urged as a primary reason for integration. Illustrative statements follow:

---

[72] A majority of the lawyers, voting on the question, voted against an integrated bar association in Minnesota and in Arkansas. See **Petition for Integration of Bar** (1948) 226 Minn. 578; 34 N. W. 2d 157, and **In re Integrating the Bar** (1953) 222 Ark. 35, 259 S. W. 2d 144. Integration has also been turned down by the courts in Montana, Tennessee and Massachusetts. See **In re Unification of Montana Bar Association** (1939) 107 Mont. 559, 87 P. 2d 172; **In re Unification of Bar of This Court** (1947) 119 Mont. 494, 175 P. 2d 773; **Re Petition for Rule of Court Activating, Integrating and Unifying the State Bar** (1955) 199 Tenn. 78, 282 S. W. 2d 782 (In Tennessee the legislature passed an act purporting to prohibit integration). **Integrated Bar** (1947) 321 Mass. 747, 74 N. E. 2d 140. The movement met defeat in the legislative field in New York. Giles, Clarence F., **"An Analysis of the Integrated Bar,"** 17 Albany Law Review, pp. 231, 239 (1953).

[73] Of course, what one group or one person believes to be justice or an advancement of justice does not necessarily coincide with the ideas of others

(1) ". . . It is obvious that an integrated bar would have a great deal more persuasive force with legislatures than now obtains. . . ."[7] ". . . [W]ithout the membership and potential participation of every lawyer in determining bar policies, the organization can never make a declaration which binds the entire profession or which obligates the profession, . . ."[8]

(2) Along with financial strength ". . . is the element of importance which is even greater, that . . . the bar is in a position to speak with a unanimous voice for all members of the profession. . . ."[9]

(3) The first advantage of the integrated bar over the unintegrated association is its ". . . influence on other agencies of government that the ordinary bar association can never have. . . ."[10]

In carrying out its aims and purposes the association seeks to change or to prevent change in the organic law of the state as well as in statute law. Its proposals may extend to anything relating to the judiciary, one of the three major divisions in government. Under the heading

---

[7]**Harley**, Herbert, Vol. 8, **Journal American Judicature Society** (Oct., 1924) p. 72.

[8]**Ibid.** p. 88.

[9]**Barkdull, H. L., "Methods of Strengthening Bar Associations,"** 35 Journal of Am. Jud. Soc. (June, 1951) p. 13. By sheer force of weight, rather than mere argument it is hoped to overcome the resistance of legislators. For example, the April 23, 1960 Minutes of the Executive Committee of the State Bar of Wisconsin contains the following statement with respect to two acts desired by the association:

"The State Bar is firmly on record in support of both of the above measures, and the Executive Director was instructed to devote his full attention to attempting to secure their passage."

[10]**Winters**, Glenn R., Vol. 39, **Journal Am. Jud. Soc.** (Feb., 1956) p. 142.

of proposals relating to the practice of law" the association goes extensively into "substantive" fields. Even in the supposedly innocuous field of "procedure" we find that lawyers may be made felons if they start certain actions which existed at common law and are now prohibited. *Supra*, p. 21.

A publication of the State Bar of Wisconsin entitled "Your State Bar in Action" (Feb., 1959) states:

> ". . . the State Bar is vigilant in analyzing legislative proposals to see that both the interests of the public and the professional interests of the lawyers are not jeopardized by the passage of bad legislation. . . ." The State Bar is constantly at work at ". . . judicial reform, legislation and constitutional amendments, adding and revamping courts, providing adequate judicial salaries and retirement plans and constant revision of the rules of pleading, practice and procedure. . . ." (page 10)

It has been authoritatively stated that:

> "Every State Bar studies and proposes legislative reform in substantive fields affecting legal practice. . . . [E]very State Bar has one or more committees which regularly recommend legislation to the state legislature.
>
> "The largest State Bars have many such committees and produce many legislative proposals.
>
> ". . . California, Wisconsin, Washington and a few other states employ full-time lobbyists during sessions of the state legislature. . . ."[7]

---

[7]Madison stated ". . . it may be repeated with the oracular sanction of Cicero, that there is no branch of knowledge which may not be involved in legal questions. . . ." Letter to Richard D. Cutts, Sept. 12, 1835, Vol. IV, **Letters and Other Writings of James Madison** (1884) p. 384.

[7]**Glaser, William A., The Organization of the Integrated Bar** (Aug., 1960) pp. 22-23. This work was prepared by the Bureau of Applied Social Research, Columbia University, for the New York State Bar Association and the Columbia University School of Law.

"Every State Bar proposes improvements in the administration of justice. . . . Adoption of the proposals will require action either by the Supreme Court or by the state legislature."[79]

In order to further promote the administration of justice, many integrated bar associations, actively participate in the field of judicial selection, attempting either to influence the governor or the electorate as the case may be.[80] In order to further promote the aims of the association, some integrated associations make public relations expenditures the largest item in the budget.[81]

The influence of the integrated association has been successfully used with respect to the veto power of a governor.[82]

d. Integrated bar associations are political parties.

Integrated bar associations are political associations—political parties. The name applies regardless of whether the association merely seeks public approval and legislative adoption of a "Code of Civil Procedure" or whether the association engages in a broad range of activities, as does the Wisconsin association. (*Supra*, pp. 17-22)

---

[79] **Ibid**, p. 24. See also **Barkdull, "Methods of Strengthening Bar Associations,"** Vol. 35, Journal Am. Jud. Soc. (June, 1951) p. 11.

[80] **Glaser, supra,** note 78, p. 25.

[81] The California association's 1959 expenditure on public relations was $80,000.00. **Ibid.** p. 27. One field where integrated bar associations drastically limit their activities is in the field of legal aid. ". . . . In practice, most legal aid is performed by voluntary bar associations and by other private organizations located in cities. . . ." **Ibid.** p. 27.

[82] See "Michigan State Bar Success" 25 Journal Am. Jud. Soc. (April, 1942) p. 170 where it is stated: ". . . The governor has been advised in respect to signing or vetoing bills, and in every instance has followed Bar counsel." (Emphasis in the original)

Whether the program of the association includes abolition of trial by jury, or bar association appointment of judges, or changing the number of members on either the state or federal supreme court, or changing rules of evidence, or revising property or tax laws or modifying the privilege against self incrimination or other legislative and constitutional proposals, or influencing the appointment or election of judicial candidates, the principle is the same.

A political party is an association of men which seeks to have certain ideas enacted into law. It is primarily a matter of principles and aims that characterizes a party. If candidates for office are endorsed, it is for the purpose of advancing such aims. Illustrative definitions of a political party follow:

> ". . . a political party here, as elsewhere generally, is a voluntary association of voters who are desirous of promoting a common political end, carrying out a certain line of public policy. . . .". *Schafer v. Whipple* (1898) 25 Colo. 469, 55 Pac. 180, 182.
>
> ". . . The political parties which I style great are those which cling to principles more than to consequences; to general, and not to especial cases; to ideas, and not to men." Tocqueville, quoted in *Kelso v. Cook* (1916) 184 Ind. 173, 110 N. E. 987, 995.
>
> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the *prevalence of certain political principles or beliefs* in the public policies of government. As rivals for popular favor they strive at general elections for the control of the agencies of the government as the means of providing a course for the government

in accord with their political principles. . . ." *Waples v. Marrast* (1916) 108 Tex. 5, 184 S. W. 180, 183. (Emphasis added)

It has even been held that a group which has no basic principles but merely advocates the election of various men is not a political party. *State ex rel. Preiss v. Seibel* (1922) 295 Mo. 607, 246 S. W. 288, 295.

That the State Bar of Wisconsin comes within the above definition is without question. It has certain aims and principles and a certain line of public policy which it desires and seeks to have carried out by the government. Even though, as of now, it apparently does not advance candidates for judicial or other office, the lack of candidates does not deprive it of its status as a political party.

Not only is the association a political party but it is a party organized along the lines of class.

e. The acts compelling membership in bar associations constitute a precedent for other types of "integrated" associations.

The far reaching effects of compelling membership in associations, particularly political associations, cannot be over emphasized. This is especially true when the judiciary and the lawyers take an active part in forming the precedent. Once established it becomes very difficult to get rid of the system—the lawyers are in control of the legislature and the courts and exercise a powerful influence throughout our society and set examples for others.

Compulsory bar associations have already served as a precedent for an integrated dental association and for many

other types of coercive measures designed to enhance the position of certain associations and to discourage practice by those who are not members of the association."

Acts compelling membership in bar associations constitute the advance guard of a movement to take the power of government from the representatives of the whole of the people and vest it in associations of classes and callings. While state legislatures had begun in the last quarter of the nineteenth century to delegate regulation of practice to ". . . private societies of artisans or professional men and often to provide that such private groups might nominate or recommend the appointment of public officials, in charge of their regulation . . .,"[10] no sustained movement in that direction had occurred until the launching of the movement for compulsory bar associations.

---

[9]Oklahoma adopted an integrated dental association act which was deliberately patterned after the integrated bar act. **Grant, supra,** note 41, pp. 323, 321. See Oklahoma R. S. 1951, Title 59, sec. 221, et seq. In the State of Washington members of the medical disciplinary board are elected by medical license holders. Rev. Code of Wash. sec. 18.72.050. The South Dakota State Nurses Examining Board is appointed from lists of names submitted by the South Dakota State Nurses Association, S. D. Code 1960, sec. 27.0903. Members of the South Dakota Board of Funeral Directors must be selected from candidates nominated by the South Dakota Embalmers and Funeral Directors Association. S. D. Stats. code 1960, sec. 27.1402. The North Carolina Board of Dental Examiners are appointed by the North Carolina Dental Society, Gen. Stats. of N. C. 1958, sec. 90-22. Four out of 9 members of the North Carolina State Board of Health are elected by the Medical Society of N. C. Gen. Stat. of N. C. 1958, sec. 130-4. The society has the right to remove for cause any member appointed by it. Sec. 130-5. In Alabama the Medical Association of the State of Alabama is made the State Board of Health. Code of Alabama 1940, title 22, sec. 1.

[10]**Hurst, James Willard, Law and the Conditions of Freedom in the Nineteenth Century United States** (1956) pp. 87-88.

Now, associations are "legislatively launched and put on their own."[45] They are both political and economic."[46]

The advocates of integrated bar associations openly assert that a return to a system such as the middle age compulsory guild system should be accomplished not only for attorneys but for other professions as well."[47]

Pound, concerned about the unionization of teachers and "closed shops for higher learning" "in an era of bigness on every side," about "absorption of the profession in the Service State," and about the servant of a government bureau who is prevented from ". . . freely applying his

---

[45]**State v. Harris** (1940) 216 N. C. 746, 6 S. E. 2d 854, 858, the court, in holding invalid an act for the regulation of dry cleaners which created a board the majority of which were required to have been in the dry cleaning business for 5 years, stated:

"Statutes regulating trades and occupations by delegation of government power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations ranging from the learned professions to the ordinary trades. . . .

"No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own."

Compare the statements of the Wisconsin court endorsing a "free and independent" integrated bar. (R. 46-47, 73)

[46]In Italy, in the 1920's and 1930's, ". . . In order to carry on business or get a job each individual is compelled to become a member or at least pay dues to his syndicate. . . . It is these compulsory corporations that have taken the place of parliament. They are both political and economic. . . ." Commons, John R., **Institutional Economics** (1934) p. 883. Commons was convinced that the basic freedom in America was the right of "free association." He felt that it made this country stronger both economically and politically than European countries. **Ibid.** pp. 901, 902.

[47]**Gilb, Corinne L., Self-Regulating Professions and the Public Welfare, a Case Study of the California Bar** (An unpublished thesis presented in partial fulfillment of the requirements of the degree of Doctor of Philosophy, Radcliffe College, Cambridge, Mass., May, 1956) pp. 1-31, 272. Said thesis is a part of the library at Radcliffe College and is on loan to the Wisconsin Historical Library.

chosen field of learning and exercising his inventive faculties and trained imagination in his own way . . .," inconsistently urges integration of the bar as "a mission of first importance," because we will be turned back to ". . . some of the universal ideas which we once mistakenly called the Dark Ages . . . and to the Middle Ages, when men had . . . ideas of doing things for the glory of God and the achievement of justice and not solely toward competitive individual acquisition. . . ."[46]

Pound overlooks the fact that his ideals, or those of any particular group, as to Justice are not necessarily those of others and that it is wholly unconscionable for the state to impose those ideals on others. He forgets that the guilds, almost from the beginning, departed from their avowed purposes and that the prime objects of the guilds became monopoly, restrictions on newcomers, price fixing, restraint on the free development of ideas—not for the glory of God or for Justice or for the Public, but for the financial benefit of the guild members."

William D. Guthrie, who lead the State of New York in rejecting the compulsory bar association idea stated:

"American history teaches us that the men of the extraordinary and scholarly generation of the last quarter

---

"**Pound, Roscoe. The Lawyer from Antiquity to Modern Times,** a study prepared for and published by the Survey of the Legal Profession under the Auspices of the American Bar Association (1953) (pp. 358-362)

Compare the statement of **Henry Upsom Sims,** in Proceedings of the 25th Annual Meeting of the Kentucky State Bar Association (1926) p. 86 that **"It is the purpose of this paper to show that class protection has not been sufficiently held in view by American lawyers. . . ."** (Emphasis added)

See also the statement of **Harley** repeating a statement of another "leader of the movement" that they were not afraid of Negro lawyers ". . . when the whole bar has jurisdiction over their conduct. . . ." 8 Journal Am. Jur. Soc. 72, 73 (Oct., 1924).

[46]**Grant, supra, note 41, pp. 305-309.**

> of the eighteenth century who founded the American bar were familiar with the English system of the Inns of Court. . . . But it was undoubtedly realized by them that such a class or caste organization would conflict with the spirit and genius of American institutions as they conceived them. . . ."[40]

C. Conclusion.

The right to freely move in and out of associations is one of the most basic rights of the American people.

It is a right which gives practical effect to the coordinate rights of freedom of speech, press, assembly and petition.

It is an inherent inalienable right secured by the two great Bills of Rights of this country—the First Eight and the Fourteenth Amendments—a right which is a markedly distinguishing feature of this country.

The right of free association is now under attack. The spearhead of the attack is the movement for compulsory membership in associations of attorneys.

The reasons for the attack are not great and compelling. They do not arise above mere legislative desires.

The reason most frequently given shows the great danger caused by the invasion. It is deliberately intended to use the force of the state to compel support of an association in order that the association may influence the people, the legislature, the governor, and the congress to act as the association desires.

---

[40]Guthrie, William D., "The Proposed Compulsory Incorporation of the Bar," 4 New York Law Review 179, 223, at page 231 (1926).

The very objective sought infringes upon constitutional guarantees. Cf. *Speiser v. Randall* (1958) 357 U. S. 513, 527.

It is respectfully submitted that the rules requiring all attorneys to associate with the bar association by putting their names on the rolls and supporting it with their dues are invalid because they directly contravene, without justifiable cause, the guarantees of the right of free association made by the Fourteenth Amendment to the United States Constitution.

II. THE COMPULSORY BAR ASSOCIATION VIOLATES THE FIRST AMENDMENT FREEDOM OF FREE SPEECH.

A. The Wisconsin Supreme Court Justified the Compulsory Bar Association on the Ground That the Securing and the Publicizing of the Opinions of Attorneys Is In the Public Interest.

The Wisconsin Supreme Court does not justify the compulsory State Bar Association on the ground that it is protecting the public against the consequences of ignorance, incapacity, deception or fraud on the part of the members of the bar.

The express justification is that the Wisconsin court is:

". . . of the opinion that the public welfare will be promoted by *securing* and *publicizing* the composite judgment of the members of the bar of the state on matters directly affecting the administration of justice and the practice of law. The general public and the legislature *are entitled to know* how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as a State Bar

can perform much more *effectively* than can a voluntary bar association. . . ." (R. 72-73, emphasis supplied)

• • •

". . . However, this court in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have *public expression* of the views of a *majority* of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same *to be voiced through* their own democratically chosen representatives comprising *the board of governors of the State Bar.*" (R. 75, emphasis supplied)

B. The Wisconsin Supreme Court Erroneously Assumed That the Compulsory Bar Association Does Not In Fact Invade Freedom of Speech.

The Wisconsin Supreme Court assumed that the compulsory bar will not in fact intrude upon the guaranteed freedoms. It said:

"He is as free as he was before to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar." (R. 70)

• • •

"When we attempt to balance the competing interests at stake in this action, *we find no regulation of, or interference with,* any of the plaintiff's rights of free speech, assembly, or petition. . . ." (R. 74, emphasis supplied)

In judging the practical effect on the individual freedoms, it must be remembered that the Wisconsin Supreme

Court anticipates that the compulsory bar will make ". . . public expression of the views of a majority of the lawyers of the state . . . the same to be voiced through . . . the board of governors of the State Bar. . . ."(R. 75) In fact, it is because of such anticipated activity that the court justifies the compulsory bar.

What, then is the plight of the member who wishes to exercise his right *not to speak* or *to remain silent* on a subject upon which the board of governors has acted? He cannot. He has been compelled to take a stand because he must belong to an organization that is expected to take a stand to justify its existence, and because his dues are used toward taking a stand. And that stand may be contrary to his views.

And if his views are contrary to the "majority," he cannot remain silent and retain the conscience that he is entitled to have left alone. His choice is either to resign—at the forfeit of his life profession and livelihood—or he *must* speak. And he must speak in a loud voice in an attempt to offset the opposing voice he has been forced to amplify against his will." Thus, the right "not to speak" is substantially impaired.

And what is the plight of the member who wishes *to speak* but whose views are contrary to the majority?

His rights are impaired because his voice is stilled.

His voice is stilled to the extent its effect is minimized by the amplification of the majority view. The group voice naturally, and contrary to the intents and characteristics of our system, drowns out the voice of the individual. *Am.*-

---

*The income of the compulsory bar is double that of the voluntary bar in 1956. (R. 4)

Comm. Assoc. v. Douds (1950) 339 U. S. 382, 443-444. (Concurring opinion)

And the individual's voice is stilled by a more subtle force. The Bar is under the control of the State Supreme Court. The voice of the Board of Governors of the Bar tends to become the "official view," the "orthodox view." So a dissident who wishes to exercise his right of free speech has the choice of remaining silent (with respect to a view that is contrary to his convictions) and thereby probably become identified with the view of the majority, or of speaking and becoming unorthodox.

> ". . . Beyond that there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at a future time. . . ." *Watkins v. United States* (1957) 354 U. S. 178 pp. 197-198.

> ". . . Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 251.

In testing the validity of an invasion the "discouraging" of the exercise of rights must also be considered. *Am. Comm. Assoc. v. Douds* (1950) 339 U. S. 382, 393.

And the infringement by the compulsory bar is not confined to the freedoms of the members of the bar. It invades the freedoms of the public.

The public has a right to be free *from* the opinions of any group. *Public Utilities Commission v. Pollak* (1951)

343 U. S. 451. And this is especially true if the opinions are "secured and publicized" (R. 72) by the government. The marshalling of private opinion for public use is not the business of our government. Private opinion is not subject to public muster. ". . . The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . ." *Thomas v. Collins* (1945) 323 U. S. 516, 545. ". . . It is not the function of our Government to keep the citizen from falling into error. . . ." *Douds case,* 339 U. S. p. 442. ". . . Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Bd. of Edu. v. Barnette,* (1943) 319 U. S. 624, 641.

Thus, we submit the compulsory bar of necessity does in fact interfere with First Amendment freedoms. It interferes with the rights of the members of the bar who wish to remain silent as well as with the rights of the members who wish to be heard. And it interferes with the rights of the public who have a right not to be bombarded with a mass voice sponsored by the government.

C. Neither a Governmental Authority Nor the Public Is Entitled to Know the Opinions of Attorneys On Any Legislation.

The Wisconsin Supreme Court is further in error in assuming that "the general public and the legislature are entitled to know" the opinions of a majority of the profession—or of any individual member thereof.

Absent the most compelling circumstances, the government is not in the least concerned with what one thinks or with an individual's opinion on any subject.

In *Reynolds v. United States* (1879) 98 U. S. 145, this court referred to early colonial attempts to tax for the support of groups or sects to whose tenets one could not and did not subscribe. It quoted with approval from a preamble to an early Virginia Act: "That to suffer the civil magistrate to intrdue his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty. . . ." (p. 163); and further quoted with approval Jefferson's statement ". . . that the legislative powers of the Government reach actions only, and not opinions. . . ." (p. 164) The court concluded that "Congress was deprived of all legislative power over mere opinion. . . ." (p. 164)

In *Thomas v. Collins* (1945) 323 U. S. 516, this court stated "This conjunction of liberties is not preculiar to religious activity and institutions alone. The First Amendment gives freedom of mind, the same security as freedom of conscience. . . ." (p. 531) And the concurring opinion in *Spieser v. Randall* (1958) 357 U. S. 513, 535:

> ". . . Today what one thinks or believes, . . . have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed 'invert the order of things.' . . . What a man thinks is of no concern to government. . . ." (pp. 535-536)
>
> * * *
>
> "I know of no power that enables any government under our Constitution to become the monitor of thought. . . ." (p. 538)

A similar observation in *American Communications Association v. Douds* (1949) 339 U. S. 382, 444, (concurring opinion) puts it this way:

". . . I think we must let his mind alone."

The Wisconsin Supreme Court justifies the securing and publicizing of the opinions of members of the bar upon the ground that such opinions will be confined to measures relating to the "administration of justice, court reform, and legal practice." (R. 72) Aside from the fact that these terms can cover a wide range of beliefs, on a multitude of subjects, the First Amendment guarantees are not so limited. ". . . The rights of free speech . . . . are not confined to any field of human interest." *Thomas v. Collins* (1945) 323 U. S. 516, 531.

D. Forced Affirmation of Belief or Opinion is Rarely Sustained.

This case involves not only an invasion by way of suppression of speech but involves forced affirmation of beliefs or opinions. A member of the bar, as stated above, cannot remain silent. He is forced, by the mere fact of compulsory membership and compulsory dues, to support a "majority" voice. And he must speak if he disagrees. If he does not, his conscience is not free. True, he may resign. But even so, his conscience cannot be freed because the price—his livelihood, his profession—is too high.

Of course, the First Amendment freedoms are not absolute. Most of the cases illustrative of this fact treat with the *suppression* of speech under circumstances where coun-

tervailing public interest justifies the interference. This public interest, for example, may be to protect against an imminent substantial evil or an imminent substantial danger, or to prevent interference with the discharge of the essential obligations of government. *Schenck v. U. S.* (1919) 249 U. S. 47, 52, and cases cited in *Am. Comm. Assoc. v. Douds* (1950) 339 U. S. 382, p. 398.

However, relatively few cases upholding an infringement of the First Amendment freedoms have involved a forced affirmation of opinion or belief as distinguished from the suppression of the expression thereof. And these few cases have found hard going in the Supreme Court of the United States. It is possible that forced affirmation involves no greater inroad into the First Amendment freedoms than suppression of expression, but as a practical matter attempts to force one to speak are rare and compelling public interests which justify such compulsion are rarer still.

A dissenting opinion in *Public Utilities Comm. v. Pollak* (1952) 343 U. S. 451, in commenting upon the meaning of "liberty," as used in the First Amendment, said:

> ". . . he may not be forced to make an affirmation . . . that violates his scruples. . . ." (p. 467)

West Virginia State Board of Education v. Barnette (1943) 319 U. S. 624, involved a forced affirmation of belief in the form of a flag salute. In holding this an unconstitutional invasion of the First Amendment freedoms, this court said in part:

> ". ... Here, however, we are dealing with a compulsion of students to declare a belief. . . ." (p. 631)

". . . Here it is the State that employs a flag as a symbol of adherence to government as presently organized. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." (p. 633)

"It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. . . ." (p. 633)

A California statutory prerequisite of non-belief in the overthrow of the government for tax exemption purposes, sustained a similar fate, although upon varying grounds. *Spieser v. Randall* (1958) 357 U. S. 513.

A denial of a license to practice law because of failure to take an oath to support the State Constitution—which provided for a militia—was sustained. *Re Summers* (1945) 325 U. S. 561. Applicant's failure to take the oath was based upon his conscientious belief in non-violence. The decision was not unanimous.

In *Sweezy v. New Hampshire* (1957) 354 U. S. 234, the Court, again upon varying grounds, *reversed* the conviction of one who had refused to answer questions concerning a lecture given at the State University. See *U. S. v. Rumely* (1953) 345 U. S. 41. And in *Watkins v. United States* (1957) 354 U. S. 178 the conviction of a witness who had refused to answer questions before the un-American Activities Committee was *reversed* on the ground that the procedural rights of the witness had not been complied with.

Several cases have involved the validity of forced affirmation as to one's stand on advocacy of overthrow of the government, or as to membership in a party advocating such action. As to teachers: *Adler v. Board of Edu.* (1952) 342 U. S. 485; *Beilan v. Board of Edu. of Philadelphia* (1958) 357 U. S. 399; *Weiman v. Updegraff* (1952) 344 U. S. 183; as to employees: *Garner v. Board of Public Works* (1951) 341 U. S. 716; *Lerner v. Casey* (1958) 357 U. S. 468; and as to a person in a position closely related to the public safety, *Am. Comm. Assoc. v. Douds* (1950) 339 U. S. 382.

None of these decisions was unanimous.

In *Konigsberg v. State Bar of California* (1957) 353 U. S. 252 the court reversed a refusal to grant the applicant a license to practice law. He had refused to answer certain questions relating to his membership in the Communist party. The opinion turned on a conclusion that the record did not support the fact-finding of the lower court. But the Supreme Court observed:

> "If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. . . ." (p. 261)
>
> • • •
>
> "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to infringe on the freedom of political expression or association. . . . It is also important both to society and

the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar. . . ." (p. 273)

E. There Is No Countervailing State Interest to Justify the Invasion of the First Amendment Freedoms.

The Wisconsin Supreme Court determined that ". . . it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to [certain] legislation . . . voiced through . . . the board of governors. . . ." (R. 75).

On the question of weighing the respective interests of the State and the members of the bar, the Wisconsin Court said:

> "When we attempt to balance competing interests at stake in this action we find no regulation of, or interference with, any of the plaintiff's rights of free speech, assembly or petition. . . . The public interest so promoted . . . far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues." (R. 74-75)

Thus, it appears that on one side of the scales the court put the fostering of public welfare by the marshalling of lawyers' opinions on legislation, and on the other side, the payment of dues by the individual member. Apparently the invasion of First Amendment freedoms played no part in the balance.

In any event, under the facts of this case, there is no such compelling public interest as justifies the inroads on the rights of the members of the bar and of the public. This court has often stated that a mere relationship is not

sufficient when First Amendment freedoms are encroached upon.

The so-called public interest here is not protection against a great public evil or a substantial danger to the public. In fact, there is no claim of evil or of danger of any kind. Neither is the public interest here in that category that justifies infringement in order to effectively and in an orderly manner discharge the governmental functions and obligations.

The only public interest asserted here is that it will be for the public good.

As stated above, "mere legislative preferences and beliefs" *Schneider v. State* (1939) 308 U. S. 147, 160, 161, or "conserving of desirable conditions" *Cantwell v. Connecticut* (1940) 310 U. S. 296, 308, or "encouragement to loyalty" *Speiser v. Randall* (1959) 357 U. S. 513, 527-528, or public aims which are merely "important" *Buchanan v. Warley* (1917) 245 U. S. 60, 81, are not sufficient.

In this case we do not have any real ". . . collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State. . . . The sole conflict is between authority and rights of the individual. . . ." *West Virginia State Board of Education v. Barnette* (1943) 319 U. S. 624, 630. In fact, here there is not even a conflict between the authority and the individual, because neither the State nor the public has a right to the individual opinions of the members of the bar on any question of legislation. The "end" sought here is opinion itself, which under the circumstances is no concern of either the State or the public.

And it can well be argued that securing and publicizing the opinions of a majority of the bar is not in the public interest at all. If marshalling such opinions tends to still the voice of the other members, it might well be that the public interest will suffer.

F. Conclusion As To Invasion of Free Speech.

We respectfully submit that the Wisconsin Supreme Court erred in its conclusion that the compulsory bar does not in fact interfere with the freedom of speech. It does so, both as to the rights of the individual members of the bar and as to the rights of the public.

It further erred in assuming that the government has a right to create machinery for the express purpose of "securing and publicizing" the opinions of any group or of any individuals. This is far from consistent with our doctrine that the mind shall be left alone. The legislature and the public is not "entitled to know" what people think.

And there is not even a meager public interest involved here. In fact, absent most compelling circumstances, the public interest demands that the voice of the individual be neither forced nor stilled, and that the public be not subjected to a government sponsored mass voice of any group.

III. CONCLUSION

As stated on pages 28-31 of the Jurisdictional Statement, the question now before this court has not been decided in any court other than the courts below with the possible exception of New Mexico.

Here we have a case of an association composed by its very nature, of the most influential men in the country, in which membership is made compulsory—an association which was created for the purpose of influencing the people, and the legislature and the Congress, and the courts, on matters of public policy.

Here rights of free speech are not only infringed upon, but the very purpose and justification is opinion itself. And machinery is created that in the opinion of the Wisconsin Supreme Court will "much more effectively" do the job. The public is to be subjected to a government sponsored mass voice. The government assumes guardianship on matters of opinion.

We cannot conceive of any invasion of constitutional freedom which has more far reaching consequences, which is of greater danger to the nation, than the invasion now before this court. With compulsory membership in associations organized along lines of class and calling, on both state and national levels, we shall become a tightly regimentated state—a society much different than any ever envisioned by the framers of the Constitution.

It is respectfully submitted that the Supreme Court of Wisconsin was in error in holding that its rules requiring membership in and support of the State Bar of Wisconsin did not contravene the Fourteenth Amendment to the United States Constitution.

We refer to the message of Governor Walter S. Goodland to the 1943 Wisconsin legislature, wherein he refused to approve a bill for an integrated bar association in the State of Wisconsin:

"The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of bill No. 56,S with its denials of individual freedom of action." (Jurisdictional Statement Appendix pp. 41a to 42a)

Although this case arose upon a demurrer to the complaint, judicial notice has been taken by the court below (R. 72) and therefore, necessarily by this court, of the activities of the integrated association. (*Supra* p. 19, note 18)

It is therefore respectfully submitted that the proper disposition of this case is to reverse the judgment of the Supreme Court of Wisconsin and remand the case to it with instructions to reverse the judgment of the Circuit Court for Fond du Lac County, Wisconsin, and to overrule the demurrer, and to enter judgment for the plaintiff against the defendant as prayed in the complaint.

Respectfully submitted,

TRAYTON L. LATHROP,
Appellant

Room 305
122 West Washington Avenue
Madison 3, Wisconsin

LEON E. ISAKSEN
Of Counsel

Room 305
122 West Washington Avenue
Madison 3, Wisconsin
November 25, 1960